No. 20196

United States Court of Appeals
For the Ninth Circuit

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, *Appellant*,
vs.
CITY OF SEATTLE, *Appellee*.
CITY OF SEATTLE, *Appellant*,
vs.
PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, *Appellee*.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

COMBINED BRIEF OF CITY OF SEATTLE
PART I — ANSWERING BRIEF AS APPELLEE
PART II — OPENING BRIEF AS APPELLANT

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INTRODUCTORY NOTE

By stipulation dated July 16, 1965, filed in this court, it was agreed by the parties that the PUD (herein also called District) should first file its opening brief, and that the City should then simultaneously answer the PUD's brief and file its opening brief. This brief is, therefore, divided into two parts. Part One answers the PUD. Part Two is an opening brief supporting our cross appeal.

We have used the same designations for reference to the various parts of the record on appeal used by the PUD in its brief.

Because of what in our view are errors of omission and commission in the PUD's Statement of the Case, we are presenting a Counterstatement. In this statement we have not repeated uncontroverted facts set out by the District.

PART ONE

BRIEF IN ANSWER TO PUD APPELLANT

COUNTERSTATEMENT OF THE CASE

These proceedings are an aftermath of a decade of litigation between the City of Seattle and Pend Oreille County Public Utility District.

Because we believe previous decisions settled several questions now raised by the PUD, we shall start by reviewing what has gone before.

Chronology of Previous Litigation

The dispute began with Seattle's filing in October, 1953 of an application with the Federal Power Commission for a preliminary permit to explore the feasibility of a hydroelectric project to be constructed at a site known as Boundary on the Pend Oreille River, in northeastern Washington.* In January, 1954, the PUD intervened, asserting that it

*Chronology of the FPC proceedings is taken from Ex. P. 9-11, decisions of the Commission reported at 26 FPC 54-145, 463-468 (1961). Our citations to these decisions will henceforth be to the FPC reports only. However, the full text of these decisions may also be found in Ex. P. 9-11. The chronology to July, 1962 is also set out in the dissenting opinion of Judge Donworth in *Beezer v. City of Seattle*, 60 Wn.2d 239, 243-249, 373 P.2d 796, 798-802 (1962).

owned "electrical" properties in the proposed reservoir area, which were exempt from condemnation by the City because of a state statute, RCW 35.84.030. In August, 1954 the City was granted a three-year preliminary permit. In July, 1957, the City filed an application for an FPC license. A month later, the PUD intervened in opposition, again raising the contention that RCW 35.84.030 would prevent the City from performing under a license, if granted. In September, 1958, the PUD filed a competing application, asking to develop a low-head hydro project at Z Canyon, a site about one mile upstream or south of the Boundary site. In October, 1958, the FPC consolidated the applications for hearing.

Seven mining companies, then owning and working lead and zinc properties immediately adjacent to the river intervened and participated in the subsequent hearings. The mining companies opposed both applications. They contended that if either hydroelectric project were built the entire Metaline Mining District, below reservoir level, might have to be abandoned, because uncontrollable flows of water might leak from the limestone walls of the reservoir into mine workings. (26 FPC 61-62). The Department of the Interior, in response to a request from FPC for its views, replied:

> "In view of the importance of the ore reserves in the Pend Oreille Mining District to the welfare and security of the United States, it is recommended that any application for license for dam construction on Pend Oreille River between the Box Canyon Dam and the Canadian Boundary be rejected." (26 FPC 74).

After an extended hearing, which consisted of a tran-

script of 17301 pages and 530 exhibits (26 FPC 62), the examiner who presided at the consolidated hearings filed a comprehensive decision in March, 1961, in which he recommended that a license be issued for Boundary, that the PUD's application be denied, and that the PUD's motion to dismiss the City's application, on state statutory grounds, likewise be denied. (26 FPC 61-145).

The FPC on July 10, 1961 issued its order (26 FPC 54-61) granting the City a license and confirming and adopting the examiner's decision in most respects. The conditions recommended by the examiner (26 FPC 143-145) and imposed by the Commission on Seattle (26 FPC 58-61) presently relevant, were:

1. *Article 37*

> "... [The] project boundary except in the vicinity of the dam and powerhouse and except upstream from Metaline Falls shall be 200 feet horizontal measurement from the high-water level of the reservoir."

2. *Article 42*

> "Prior to raising the water level of the Boundary reservoir, the Licensee shall at its own cost relocate or make such modifications in mining facilities in the reservoir as may be necessary or appropriate for safe operation of the then existing mines."

3. *Article 43*

> "The Licensee shall take appropriate measures to assure the watertightness of the reservoir..."

4. *Article 47.*

> "Within ninety (90) days after the license for the Boundary Propect becomes effective, Licensee shall install and maintain adequate gaging stations in and along Pend Oreille River..."

5. *Article 48.*

> "The Licensee shall within two years from the time Boundary Project is placed in operation, enter into an agreement with Public Utility District No. 1 of Pend Oreille County to compensate the PUD for encroachment on the Box Canyon Project No. 2042. In the event no satisfactory agreement is concluded by such time, then upon application by the PUD the Commission shall fix and determine the compensation to be made by the Licensee to the PUD for such encroachment after notice and opportunity for a hearing."

On September 6, 1961, the Commission issued an order denying the PUD's and mining companies' petitions for rehearing. (26 FPC 463-468). However, it added a requirement to Seattle's license which had been recommended by the examiner, but initially rejected by the Commission:

Article 49.

> "The Licensee shall assign 48,000 kilowatts to the PUD from the Boundary Project at the PUD's system load factor, any part or all of which shall be available to the PUD at cost upon two years' notice by the PUD, to meet the load requirements of present or potential consumers (not including purchasers for resale) within the PUD's service area . . ." (26 FPC 467-468).

Both the original decision rejecting the examiner's recommendation and the final decision adopting it as Article 49, were by divided votes of the Commission. (26 FPC 61, 468). The 48,000 kilowatts made available to the District at any time on two years' notice was almost four times the annual maximum demand of the PUD in 1958 of its customers in Pend Oreille County. (26 FPC 107).

The Commission's order was affirmed by the Court of Appeals for the District of Columbia Circuit. *Public Utility District No. 1 of Pend Oreille County v. Federal Power Com-*

mission, 308 F.2d 318 (1962), cert. den. 372 U.S. 908 (1963), pet. for rehearing den. 372 U.S. 956 (1963), second pet. for rehearing den. 375 U.S. 871 (1963). Relevent to the present proceedings because of the District's claims of power site value and severance damage, the Circuit Court held that the properties here in question were not used or useful as part of the PUD's "electric plant or system". (308 F.2d 323).

The PUD also intervened in a taxpayer's suit in state court to enjoin the City from executing under its license. Again, it was the position of the PUD that its property and property rights, which are the subject of the present proceedings, were electrical properties, immune from condemnation by the City because of RCW 35.84.030. Although the Washington Supreme Court ultimately held in the PUD's favor, 5-4, on this issue, *Beezer v. Seattle*, 60 Wn.2d 239, 373 P.2d 796 (1962), motion to dism. app. den. 60 Wn.2d 652, 375 P.2d 256 (1962), mand. granted 62 Wn.2d 569, 383 P.2d 895 (1963), the United States Supreme Court reversed unanimously in a per curiam opinion, 376 U.S. 224 (1964).

The correctness of the FPC's finding that PUD's properties were not part of its electric system, confirmed by the Circuit Court, and upheld by the United States Supreme Court when collaterally attacked by *Beezer*, is apparent when one considers the character of the rights held by the PUD.

PUD Property and Property Rights

Four parcels or property interests are involved in these proceedings. They are described in the findings. (Tr. 84-87). They were inspected by the trial judge on a pre-trial view trip. He also inspected the Box Canyon dam and powerhouse and the Boundary site. (Tr. 80). The PUD purchased all four parcels here involved, as part of a larger package, from the widow of Hugh L. Cooper in 1953 for a total consideration of $20,100. (Ex. D. 117). This amount covered not only all of the property interests taken in this action but also other Cooper holdings, rights and drawings for the reach of the river between the Canadian border and Lake Pend Oreille, about 75 miles upstream, including the Box Canyon dam site and overflow rights for a distance of 15 to 20 miles upstream from Box Canyon. (R. Tr. 951-952). The rights not involved here were thus necessary for the PUD's Box Canyon project.

The four parcels here in question are the following:

(1) *Uplands*

The PUD owned 212 acres of uplands on the west side of the river at the Z Canyon site. (Ex. P. 5). Of this acreage the City took 81.73, the area of uplands within 200 feet of the reservoir. This was pursuant to Article 37 of the City's license, which defined the project boundary as "200 feet horizontal measurement from the high-water level of the reservoir." The exact line of taking is shown on a map, Exhibit P. 26.

(2) *Fee Shorelands*

The PUD owned in fee the shorelands on both sides of

the river from a short distance downstream of the Boundary site up to Lime Creek, two or three miles south, or about 450 chains. (Ex. P. 4). The extent of these shorelands is shown on a map, Exhibit P. 80-A. The Pend Oreille River, in this stretch, flows through a deep gorge, so that the lateral extent of the shorelands is very limited. This is illustrated by two pictures, Exhibits D. 113 and D. 114, which the PUD reproduced in its opening brief following page 6.

(3) *Easement over Shorelands*

The third property interest which the PUD owned (Ex. P. 6) was the right to overflow the shorelands from Lime Creek south to the tailwater of Box Canyon dam, a distance of about 15 miles, or 2400 chains. The nature and extent of the affected shorelands may be seen from Exhibit P. 30, aerial photographs of the entire Boundary reservoir, flown at low flow (R. Tr. 60-61).

(4) *Gaging Station Easement*

The City had already acquired at the time of trial, the underlying fee to the property to which this easement pertains. (Tr. 87). The right acquired was, therefore, extinguishment of the easement, which was a right of ingress and egress over the upland property to reach the site of a stream gage erected by the PUD's predecessor in interest, Cooper, on the fee shorelands. (Tr. 87, 99, Ex. P. 7). The gage itself had been constructed by Cooper as required by FPC preliminary permit (Project No. 44) to explore the feasibility of a project at Z Canyon.

Cooper's application for a license for Z Canyon was later denied by the Commission in 1936. (Tr. 92-93). The United States Geological Survey had operated and maintained the station since 1941. Since August 1, 1954, the City of Seattle had paid all of the costs of maintenance pursuant to its preliminary permit and later its license for Boundary. The City installed, as part of its license obligation, a new substitute gage station a short distance downstream from Boundary dam. The Geological Survey planned to abandon the Z Canyon gage by October 1, 1964. (Tr. 92-93).

The map reproduced by the PUD in its brief following page 6 is inaccurate in that it represents that the PUD had some right or title to the bed of the Pend Oreille River. This contention was disclaimed by the PUD's counsel when the map was offered. (R. Tr. 979). Another shortcoming of the map is that it neglects to show the 200-foot buffer strip of uplands required by the FPC to be included in the project boundaries for Boundary between the dam site and the Town of Metaline. It thus is drawn on the farfetched premise that a developer of Z Canyon would have to acquire property only to the line of ordinary high water.

By appropriate findings the court recorded the facts that the City's project boundaries had been approved by the FPC and that all of the property interests taken were within those boundaries, and were necessary to Boundary project. (Tr. 83-84). These findings are not disputed on this appeal. Therefore, the only issues before this court concern amount of compensation. The PUD contends that the com-

pensation awarded was not enough. The City in its appeal contends that the amount was too much.

The PUD in its Statement did not summarize the testimony of the City's witnesses on value. Their testimony was used by the court in determining the award to the PUD. Hence, review of that testimony is important to an understanding of the issues on the PUD's appeal.

City's Witnesses as to Value

Glen L. Butler

Mr. Butler's qualifications included a degree from the University of Idaho, membership in various professional societies, including past presidency of the Washington Chapter of American Institute of Appraisers (R. Tr. 80), and appraisal work of all types for federal, state and local agencies and for property owners. (R. Tr. 81-82). He had also had extensive experience with the Corps of Engineers as an appraiser with the Walla Walla District. In that capacity he had made detailed appraisals of reservoir property for appropriation purposes for several hydroelectric projects on the Columbia River, including McNary, John Day and Chief Joseph. He had also appraised reservoir property for Priest Rapids for the Grant County PUD, the Howard A. Hansen dam near Seattle, for the Corps of Engineers and Lucky Peak dam, near Boise. He had also appraised property for the Corps in connection with the Albeni Falls project on the Pend Oreille River immediately upstream from Box Canyon. (R. Tr. 82-83).

Mr. Butler made a personal inspection of the properties

to be acquired. (R. Tr. 84-89). He appraised the property interests on two different premises:

(1) Disregarding the adaptability of the properties for reservoir purposes, and

(2) Giving full consideration to such adaptability, (R. Tr. 95-97).

Mr. Butler found that "there was no measurable difference" in valuation, under these two different assumptions. (R. Tr. 97).

On his first premise, he found the highest and best use of the uplands to be for reforestation purposes. Based on several comparable transactions which he described in detail (R. Tr. 97-109), Mr. Butler found that the value of the uplands for that use was $17.50 an acre, or $1,430.28 for the 81.73 acres. (R. Tr. 129). He found no damage to the remaining uplands by virtue of the taking. (R. Tr. 130).

Mr. Butler also described the extensive investigation he had made upon his second premise. He not only visited the sites of twelve hydroelectric projects in Washington, Idaho and Montana (R. Tr. 91) *, but also examined transactions involving properties in many reservoirs throughout the Northwest. (R. Tr. 90-91). He found one truly comparable transaction involving a sale of one of the abutments of the Dworshak Dam (formerly Bruce's Eddy) on the north fork of the Clearwater River in Idaho. (R. Tr. 110-114). Two

*The locations of the various projects referred to in Mr. Butler's testimony are shown on Ex. P. 28, a Corps of Engineers map.

private individuals sold 60 acres of uplands in 1956 to the Pacific Northwest Power Company, which then had an FPC preliminary permit to study the site, for $1,000, or $16.67 an acre. (R. Tr. 114-115, 161-163, Ex. P. 39). Where, as in this transaction, threat of condemnation might have been involved, Mr. Butler took written statements from the sellers to demonstrate the voluntary nature of the transactions. (R. Tr. 117-118).

Other transactions regarded by Mr. Butler as pertinent involved the Rocky Reach and Wells dams on the Columbia. There, he found that no increment or bonus was paid for any of the properties, including an abutment for the Wells dam (R. Tr. 160), because of their adaptability for power or reservoir purposes. (R. Tr. 118-122). Rather, the properties were sold for what they otherwise were, orchard lands, irrigable lands, grazing lands, rocky area and so forth. (R. Tr. 120).

Mr. Butler also used the comparative transaction or market approach to value in analyzing the shorelands. He found that the State of Washington, which owns most of the shorelands in the state, does not appraise them with relation to their potential utilization for power or reservoir purposes, but rather as to their suitability for use in connection with home sites or for recreational purposes. (R. Tr. 125). Mr. Butler described a purchase in 1956 of shorelands by the Pend Oreille PUD in connection with Box Canyon for $5.00 a chain. (R. Tr. 125-126).

As to the easement over shorelands, Mr. Butler felt that for valuation purposes it was tantamount to a fee. (R. Tr. 128).

Hence, he valued both the fee shorelands and the easement shorelands at $5.00 a chain, (R. Tr. 129).

Finally, he placed a nominal value of $1.00 on the extinguishment of the easement for ingress and egress to the Z Canyon gage. His opinion was based on his judgment that since a substitute gaging station was being provided, the right of access to the old gage had no value. (R. Tr. 128).

Mr. Butler's opinion as to value of the PUD's property, as a whole, was $15,920.72, which he rounded off to $16,000. (R. Tr. 130).

On cross examination, Mr. Butler stated that he had considered the fact of common ownership of the uplands and shorelands. (R. Tr. 134, 147). He also said, "Power site value, in the market, I have considered in my evaluation." (R. Tr. 134). He simply found from his comprehensive investigation that no premium was paid in the market place for property merely because it formed part of a potential reservoir. (R. Tr. 135-136).

J. C. McQuigg

Mr. McQuigg's qualifications included 35 years as a real estate appraiser, during which time he had appraised a great variety of properties for public and private agencies including everything from airfields to cemeteries. (R. Tr. 168, 212). He likewise inspected the property to be taken and made a survey of transactions involving dam sites and reservoirs in the Pacific Northwest. (R. Tr. 169, 246-247, 257). From this survey he concluded that no "excess prices" were paid for

properties which happened to be within known potential power reservoirs. (R. Tr. 248). As reforestation property, Mr. McQuigg found from a canvass of comparable properties, which he described in detail, a value for the part of the uplands to be taken of $1,430. (R. Tr. 191-192). He found no damage to the remainder of the uplands from the taking. (R. Tr. 192).

Mr. McQuigg also arrived at what he believed to be the fair value of the shorelands. He described a transfer by the State to Pend Oreille PUD in 1956 of 8,454 lineal chains for the Box Canyon reservoir, for $5.00 a chain. (R. Tr. 194-200). He also described a transfer of shorelands from the State to Grant County PUD in connection with the Priest Rapids project on the Columbia. These 4,647 chains were transferred in 1961 to Grant County PUD at $5.00 a chain. (R. Tr. 207). In connection with this transaction, counsel for the City drew the court's attention to RCW 43.09.210, a section of the State Accountancy Act which provides that property transferred from one public body to another of the State of Washington must be for its full value. Mr. McQuigg concluded, from his study, that the value of the PUD shorelands, whether held in fee or merely by way of easement, was $5.00 a chain. (R. Tr. 207). For reasons similar to those given by Mr. Butler, Mr. McQuigg placed a nominal value on the easement to the Z. Canyon gaging station. (R. Tr. 209-210, 235).

Mr. McQuigg's total valuation was $15,920. (R. Tr. 210).

He stated on cross that he felt the common ownership of

the uplands and shorelands did not give the property additional value. (R. Tr. 223-224). Mr. McQuigg stated that in his experience, for property to bring power site value, all of the property would have to be assembled, licenses to construct would have to be obtained and markets would have to be established. (R. Tr. 240-241).

SUMMARY OF ARGUMENT

I. PUD's Specifications of Error Nos. 1-5, and 7 Are Without Merit.

II. PUD Is Not Entitled to Severance Damage (Specification of Error No. 6).

III. PUD's Case For Power Site Value Failed Because of Its Failure to Show Reasonable Probability of Devoting Property to Reservoir Use.

IV. Valuation Methods Used by *Twin City* and *Grand Hydro* Appraisers Were Never Judicially Approved and Were, In Any Event, Different From Those Employed By PUD Witnesses.

V. The "Taking" of the Power Value of the PUD's Properties Is Not Compensable Because of the Federal Navigation Servitude.

ARGUMENT IN ANSWER TO PUD APPELLANT

The PUD has incorporated much of its argument under its individual specification of errors (App. Br. 33-49). Hence, we shall address ourselves first to these specifications.

Point I

PUD'S SPECIFICATION OF ERRORS NOS. 1-5 AND 7 ARE WITHOUT MERIT

A. PUD'S SPECIFICATION OF ERROR NO. 1 TESTIMONY OF ARTHUR E. ALLEN

(App. Br. 33-38)

This claim relates to the striking of the testimony as to the cost of constructing a high dam at the Boundary site. (R. Tr. 627-629, 712-721). The witness was permitted to testify over objection as to the cost of a possible high dam at Z Canyon. (R. Tr. 648-669, See also Ex. D. 130-A, analysis of the costs of such a project, received in evidence at R. Tr. 669). The witness also testified over objection as to the cost of a possible low dam at Z Canyon. (R. Tr. 709, Ex. D. 130-B).

The action of the court in striking Mr. Allen's testimony as to Boundary was correct. The PUD's sole property interest anywhere near the Boundary site was shorelands. Its only upland ownership was at Z Canyon. But even assuming this ownership be regarded as sufficient to justify testimony of the cost of a project to be constructed at the Boundary site, it did not justify hearsay testimony as to the costs being incurred by the condemnor in constructing a project there. Moreover, since the court found, and no error is assigned to the finding, that a developer could probably not construct any dam at all at Boundary without a right of condemnation, the ruling had no practical effect. (Tr. 88).

The basis of the trial court's ruling, striking Mr. Allen's testimony as to Boundary, was the well settled principle that value to the taker may not be considered in determining just

compensation. In *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 80-81 (1913), the Court said:

> "But in a condemnation proceeding... the value of the property to the government for its particular use is not a criterion."

The same proposition was stated in *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910) where Mr. Justice Holmes, speaking for the court, said:

> "And the question is, What has the owner lost? not, What has the taker gained?"

The same principle was recognized by the Court in *United States v. Miller*, 317 U.S. 369, 375 (1943):

> "... special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value."

Also see *Continental Land Co. v. United States*, 88 F.2d 104, 110 (9th Cir. 1937), cert. den. 302 U.S. 715 (1937), *Chicago B. & Q. R. Co. v. North Kansas City Dev. Co.*, 134 F.2d 142, 152 (8th Cir. 1943), cert. den. 319 U.S. 771 (1943) and *Standard Oil Co. v. Moore*, 251 F.2d 188, 221 (9th Cir. 1957), cert. den. 356 U.S. 975 (1958). In the *Moore* case this court recognized the rule that opinions as to value, based upon developments subsequent to the valuation date, are inadmissible. The policy which forbids opinions based on the hindsight of later actual events would be violated if the PUD were permitted to use the City's actual cost experience in using the property to construct Boundary as a foundation for opinion as to the value of its property.

Mr. Allen's use of the City's data was improper under *Miller* and other cases. His rejected report, Exhibit D. 130, as to the cost of a project at Boundary, was admittedly based entirely on the City of Seattle's plans, designs, drawings and costs for a project which was then under construction by the condemnor. (R. Tr. 606-625). He used the actual bids and the contract prices. (R. Tr. 623-627). He even used the City's estimates as to plant output in computing his unit costs. (R. Tr. 625).

Mr. Allen's exhibit and testimony concerning Boundary were entirely grounded on hearsay. He had no connection whatsoever with the preparation of the City's design drawings and specifications. The City objected to his testimony on the ground that it was hearsay. (R. Tr. 627). We assume that if it were proper at all for a landowner to show the exact use to which the condemnor was putting the property at the time of trial, and the actual costs being incurred in putting the property to this use, that the proper procedure would be to call City officials or engineers and have them identify and authenticate the designs and costs. Mr. Allen's attempt to vouch for the City's designs he had copied and the City's costs which he claimed to have obtained was simply not proper from an evidentiary standpoint.

The judge's ruling as to Mr. Allen's testimony on Boundary costs and plant output became academic, in the light of the finding entered by the court. It found that a prospective developer of either the Boundary or Z Canyon site, except for a low dam at Z Canyon, could probably not ac-

quire the necessary properties by voluntary transfer if it be assumed that such developer did not have the power of eminent domain. (Tr. 88). It also reached the conclusion that the PUD did not sustain its burden on this score. (Tr. 94-95). In this circumstance, it is well settled that value of lands for reservoirs or power purposes may not be awarded to an owner. *McGovern v. New York*, 229 U.S. 363 (1913); *New York v. Sage*, 239 U.S. 57 (1915); *United States ex rel T.V.A. v. Powelson*, 319 U.S. 266 (1943).

Since the PUD failed to establish this premise which is essential to recovery of power site value, the testimony of Mr. Allen as to Boundary, even if received, would have had no effect. In *McGovern*, the Supreme Court in an opinion by Justice Holmes upheld the exclusion of evidence in a state court as to the exceptional value of land for a reservoir site where it appeared that many properties would have to be collected, stating that the power of eminent domain could not be considered in determining whether this was possible:

> "...The enhanced value of the land as part of the Ashokan reservoir depends on the whole land necessary being devoted to that use. There are said to have been hundreds of titles to different parcels of that land. If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect on the valuation...The plaintiff in error was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was considerable enough to be a practical consideration and actually to influence prices... *In estimating that probability, the power of effecting*

the change by eminent domain must be left out." (p. 372; emphasis supplied).

And in *New York v. Sage*, 239 U.S. 57 (1915), the Court reversed lower federal court rulings admitting evidence on reservoir value of lands sought by the city on the ground that it did not appear that the lands could be used for such purpose without the exercise of eminent domain powers. Justice Holmes said, speaking for a unanimous Court:

> "The decisions appear to us to have made the principles plain. No doubt when this class of questions first arose it was said in a general way that adaptability to the purposes for which the land could be used most profitably was to be considered; and that is true. *But it is to be considered only so far as the public would have considered it if the land had been offered for sale in the absence of the city's exercise of the power of eminent domain.* The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price. But what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact, – not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots. *The city is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain.*" (p. 61; emphasis supplied).

On remand from the Supreme Court, a final order was entered by the District Court excluding the additional compensation for "reservoir availability and adaptability." Learned Hand, J. said:

> "I can see no reason to suppose that there was any practical way of uniting this land with adjoining lands into a reservoir site except by the right of eminent domain. The possibility which Mr. Justice Holmes has in mind is that the land might have an added value due to its availability for such a union through the usual course of the market, just as a corner lot has added value in the city of New York if available for an apartment house. Nobody can suppose that a reservoir site can result in that way, or without the right of eminent domain as a necessary condition. If so, no part of the availability value is to be included . . . Even though there was a possible prospect of other cities competing for the land, they would have each proceeded by eminent domain . . ." (*In re Bensel*, 230 F. 932 (1916)).

In *United States ex rel T.V.A. v. Powelson*, 319 U.S. 266 the land owner, a public utility, sought water power value for lands taken by the Government on the theory that the lands condemned, together with other property it owned, could be united with several hundred other tracts owned by strangers through the exercise of the utility's state eminent domain powers and that a four-dam hydroelectric project could be constructed upon all those lands. It was conceded that all the property necessary for the four-dam plan could not be acquired except through resort to the power of eminent domain. The Court, based on the *McGovern* and *Sage* cases, threw out an award based on such a theory on the ground that in determining value the power of eminent domain possessed by the land and owner must be left out:

> "The result is that respondent's privilege to use the power of eminent domain may not be considered in determining whether there is a reasonable probability of the lands in question being combined with other tracts into a power project in the reasonably near future. If the power of eminent domain be left out of account, the

> chances of making the combination appear to be too remote and slim 'to have any legitimate effect upon the valuation.' *McGovern v. New York*, supra . . . Respondent therefore has not established the basis for proof of the water power value which was asserted." (p. 285).

Orgel, after analyzing the foregoing Supreme Court cases, stated their teaching as follows:

> "If . . . the particular use is not likely to result except through the exercise of the power of eminent domain, it must be excluded in arriving at the market value. Although recognizing the danger of oversimplifying the actual holdings of the courts, we may say that the rule requires the exclusion of the taker from the hypothetical market. The problem is then reduced to that discussed in Chapter II supra, as to what uses may be considered as bearing on the market value of the property. But in canvassing the uses for which the property is available, those uses which require the power of eminent domain to make them effective must be excluded from consideration.
>
> "In other words, under the rule enunciated by the Supreme Court, the owner in contending for a special value for the taker's purposes must show that there was such a probability of other purchasers as would affect the market value and that such probability was independent of the exercise of compulsory powers of acquisition." (1 Orgel, Valuation Under the Law of Eminent Domain 381 (2nd Ed. 1953)).

The above rule was applied in *Olson v. United States*, 292 U.S. 246 (1934). That case involved condemnation by the United States of flowage easements over lands bordering on the Lake of the Woods, instituted pursuant to a treaty between the United States and Great Britain entered into in 1925 regulating the use of the lake as a storage reservoir for the development of water power in Canada. The question in the *Olson* case, answered in the negative by the Supreme

Court, was whether the government would have to pay value for reservoir purposes. The Court observed that in order to establish the reservoir, many parcels of land had to be condemned which were owned by many individuals, by the United States, and by other governmental bodies. In denying power value, the Court said:

> "... But the value to be ascertained does not include, and the owner is not entitled to compensation for, any element resulting subsequently to or because of the taking. Considerations that may not reasonably be held to affect market value are excluded. Value to the taker of a piece of land combined with other parcels for public use is not the measure of or a guide to the compensation to which the owner is entitled. (Citing cases). The use of shorelands for reservoir purposes prior to the taking shows merely the physical possibility of so controlling the level of the lake. *But physical adaptability alone cannot be deemed to affect market value. There must be a reasonable possibility that the owner could use his tract together with the other shorelands for reservoir purposes or that another could acquire all lands or easements necessary for that use. The trespass committed by means of the dams added nothing to the value of the shorelands.* (p. 256-257; emphasis supplied).

The rule was stated by this court in *Continental Land Co. v. United States*, 88 F.2d 104 (9th Cir. 1937) which involved condemnation of the dam site for Grand Coulee. It was pointed out there that the lands necessary for the dam and reservoir behind it were in many ownerships, including the United States, and there was no probability of their being united without the exercise of the power of eminent domain. See also *Washington Water Power Co. v. United States*, 135 F.2d 541 (9th Cir. 1943); *Smither v. United States*, 91 F.Supp. 582 (Ct. Cl. 1950), *cert. den.* 340 U.S.

931 (1951) and *United States v. Cooper*, 277 F.2d 857 (5th Cir. 1960).

B. SPECIFICATION OF ERROR NO. 2 TESTIMONY OF JOHN L. VAUGHAN

(App. Br. 38-41)

The testimony as to value of Mr. Vaughan was properly stricken on several grounds:

1. His entire method was to determine what a dam builder *could* pay, not what a willing buyer *would* pay.

2. Even in determining what someone *could* pay, he misused an FPC brochure which set forth what amounts were carried in the land and land rights accounts on several federal and non-federal projects. These lump sums included a non-segregated pot pourri of items, such as sums paid for relocation of railroads and highways, condemnation judgments, attorney fees, appraiser fees, clearing costs, and even court costs.

3. The opinion as to value expressed by Mr. Vaughan rested on inadmissible hearsay.

4. He based his value on the incorrect assumption that the PUD rights carried with them the right to divert and store the waters of the Pend Oreille River, the right to use federal lands and most other perquisites of a Federal Power Commission license.

5. He stated that it was essential, for his "bundle of rights" theory to apply, for the dam builder who would construct high Z Canyon to have the right of condemnation.

6. His value testimony related solely to a possible high dam at Z Canyon, which the court found could probably not be constructed, without assuming that the developer had a power of condemnation.

We shall discuss these grounds in the order set forth above.

1. The Test Is What a Buyer *Would* Pay, Not What He *Could* Pay

One fundamental fallacy of Mr. Vaughan's testimony as to market value was that it was based on an analysis of what a dam entrepreneur could pay for the PUD's property rights and still have a feasible project. To understand Mr. Vaughan's testimony it is necessary to consider the state of the PUD's proof when Mr. Vaughan commenced his testimony. It had first of all, through Mr. Allen, introduced evidence, over the City's objection, as to the capacity and cost, excluding financing and land and land rights, of a hypothetical high dam to be constructed at Z Canyon. (See Ex. D. 130-A). It next, through Mr. Stenson, put into the record, again over the City's objection (R. Tr. 756-757) an estimate as to the total financing costs for the high Z Canyon project postulated by Mr. Allen. Mr. Stenson came up with a total bond issue for high Z Canyon of $77,600,000 (R. Tr. 778) exclusive of land and land rights and relocation costs. (R. Tr. 787). Mr. Stenson also gave his opinion as to the cost of power from the project described by Mr. Allen, assuming the financing costs estimated by Mr. Stenson. (R. Tr. 779).

At this point the PUD produced Mr. Vaughan to testify as to the "bundle of rights" owned by the PUD. Included in

this "bundle of rights" thought by Mr. Vaughan to be owned by the PUD was the right to use the federal domain:

> "Since it is necessary to appraise the right to build the hydroelectric dam, which is created by these rights, there are several approaches which can be considered." (R. Tr. 1080).

If there were any doubt that Mr. Vaughan considered the use of federal lands, which comprised more than one-half of the reservoir area (Tr. 88-89), as part of the PUD's property for valuation purposes, it was dispelled by the following testimony:

> "Q Your assumption was, I take it, that anybody with the privately owned lands necessary to construct the project, could get the use of the Federal land, upon making a proper application, assuming that he had a feasible project and therefore he would not have to include in his land and land rights cost, the value of the Federal lands involved.
>
> A That is right.
>
> Q So that, following that same reasoning, it wouldn't make any difference how much or how large the overall Federal ownership was in the particular project area, as long as there was some private property, and the man who owned that some private property would have the necessary bundle of rights.
>
> A Yes.
>
> Q If, for example, the Federal owned land in the area constituted 99% of all the land and land rights necessary to construct this Federal Project, and the privately owned interests in the reservoir area was 1%, you would value that 1% interest with this bundle of rights approach, and arrive as a value similar to that which you have arrived at for the PUD property in this case?
>
> A Yes." (R. Tr. 1210-1211).

To bridge the gap between Mr. Stenson's figure of total project costs, exclusive of land and land rights, and *total* project costs, Mr. Vaughan made "a judgment allowance" of $100,000 to pick up the remaining non-federal rights. (R. Tr. 1211). In arriving at this figure he relied upon a figure given to him by Mr. Oberbillig, a previous witness, (R. Tr. 1212) whose testimony on this subject had been held inadmissible. (R. Tr. 1056-1058). In doing this, Mr. Vaughan was basing his opinion on facts and opinions not in evidence, a practice held improper by this court in *Standard Oil Co. v. Moore*, 251 F.2d 188, 221 (1957).

In any event, Mr. Vaughan then proceeded to describe his valuation procedure, which centered around a Federal Power Commission publication called "Hydro-electric Plant Annual Construction Costs and Production Expense, Fifth Annual Supplement, 1961". From the statistics given in this publication, he selected a group of four plants upstream from the reach in question. These were Albeni Falls, a federal plant; Cabinet Gorge and Noxon Rapids, owned by the Washington Water Power Company and Box Canyon, owned by the PUD. (R. Tr. 1098, 1188). From the PFC publication he extracted those portions of the land and land rights accounts charged to power production. He recognized that some unidentified person had made some allocation in charging costs to power, storage and other uses, on some unknown basis. (R. Tr. 1199). He also extracted from the publication the total costs of the plants and annual production of energy. From this he developed a figure for land acquisition costs as a function of kilowatt hours of energy produced in a year.

(R. Tr. 1083). He then used this figure to arrive at a cost which a developer *could* pay for high Z Canyon land and land rights, based on the estimated production of a hypothetical plant.

Mr. Vaughan described his methodology:

"Q As to this document, as I understand it, you took the number of plants at arriving at a composite figure which utilized the per cent of overall cost, represented by acquisition of land and land rights?

A Yes.

Q You reduced that to cost per kilowatt hour of energy produced by a plant over a period of a year?

A Yes.

Q Then you took that per kilowatt hour figure and applied it to the figure which the Harza Engineering Co. showed the High Z could produce, and using that same percentage figure you arrived at your conclusion as to the value of the land?

A No.

Q Would you explain that last, please.

A This is related to the investment, the original cost of plant, not to the cost of generation.

Q It was original cost of plant per kilowatt hour?

A Generation.

Q Of generation?

A Yes.

Q So that you took the kilowatt hour of generation which Harza indicated could be produced by a High Z, and using the factor which you had previously arrived at for the other plants, simply applied that factor in arriving at a land value, for the land under the High Z?

A To the entire bundle of land rights."
(R. Tr. 1187-1188).

Mr. Vaughan then made another calculation in which he used the land and land rights accounts of the Brownlee, Cabinet Gorge, Chief Joseph, The Dalles, Davis, Hungry Horse, McNary Lock, Noxon Rapids and Upper Baker projects. (R. Tr. 1189). This time he developed a figure from the FPC material for "total investment in hydroelectric facility as a function of the name plate capacity." (R. Tr. 1083-1084). Presumably Mr. Vaughan was referring to total investment in land and land rights as reflected by the FPC account in question. (R. Tr. 1189-1190).

Out of the foregoing Mr. Vaughan somehow arrived at a figure of $34,000,000. (R. Tr. 1205). Then, for reasons he did not explain, he reduced this to $8,800,000. Finally, he reduced that to $8,700,000 to account for his "judgment allowance" of $100,000. (R. Tr. 1205). The fundamental objective of Mr. Vaughan's methodology was thus to determine what a dam builder could pay for Z Canyon land rights, based upon the economics of the hypothetical project testified to by Messrs. Allen and Stenson.

2. Misuse of FPC Brochure

When Mr. Vaughan's testimony was completed, it was obvious that he had simply taken a number of plants at random, including multipurpose projects, and arrived at a composite figure which utilized the per cent of overall cost represented by a certain FPC account. He took those figures from a hearsay document. What is worse, the criteria used by

the unidentified compilers of the brochure were not shown. For example, the basis upon which judgments were made as to proper allocation of land costs between power and other uses, such as storage and flood control, was unknown to Mr. Vaughan. (R. Tr. 1198-1199).

This court had before it a somewhat similar issue in *Fairfield Gardens, Inc. v. United States*, 306 F.2d 167 (9th Cir. 1962). That case involved the condemnation of a Wherry Housing Project. A government appraiser sought to arrive at a conclusion as to fair value by deriving a composite figure from a number of other Wherry projects. He apparently made no effort to determine whether the individual projects selected for comparison were in fact comparable. His position was that it was immaterial whether the projects were built of brick, wood, stone or stucco or where they were located. He used as his sole criterion capitalization of the incomes of these various projects. This court held that the evidence was properly excluded, since the other projects were not shown to be comparable.

In the instant case, Mr. Vaughan offered no explanation whatsoever as to why he had selected the projects he did for comparison with the hypothetical project at Z Canyon. Very similar to the appraiser in the *Fairfield Gardens* case, Mr. Vaughan used as a sole criterion of comparability the ratio between investment in an ill defined FPC account, Land and Land Rights, with total production or capacity. Perhaps the government appraiser in *Fairfield* had some direct or admissible hearsay knowledge of the costs of the

other Wherry projects. But Mr. Vaughan testified that he did not even know whether the cost allocations as to use were made by the dam proprietors or by the Commission. (R. Tr. 1199-1201). He merely testified that since the allocations were made "that there must be some reasonable assumption of the validity of them." (R. Tr. 1200). He was hazy as to just what the relevant FPC account included, but believed it included relocation of highways, relocation of roads, survey costs, clearing costs (R. Tr. 1202-1203) and supposed that there were also included condemnation costs, including court costs and counsel fees. (R. Tr. 1208).

In argument of the City's motion to strike (R. Tr. 1265) counsel for the City showed what a meaningless exercise Mr. Vaughan's use of the FPC brochure was by pointing out that Hungry Horse, one of the projects used by Mr. Vaughan, was shown in the FPC brochure as having $55,050,000 in the land and land rights account. Yet Hungry Horse is a Bureau of Reclamation project located entirely within a national forest. (See Exhibit 28 as to location). Hungry Horse, on the other hand, a tremendous storage project, undoubtedly involved huge relocation costs. Just who decided how much of the relocation should be charged to power and how much to storage, and what considerations went to make up this judgment the record does not disclose. Moreover, Mr. Vaughan used an FPC land account, which included relocation and clearing costs, to compare directly with Z Canyon. Yet he disregarded necessary relocations and clearing costs in evaluating Z Canyon as a dam site. (R. Tr. 1205).

Another fatal flaw which inheres in Mr. Vaughan's use of the FPC brochure is that by using the figures there set out for land and land rights, he has violated the well established rule that transactions which involve sales to agencies possessing the right of condemnation are presumptively inadmissible because they do not reflect market value. See cases gathered at 85 A.L.R. 2d 110, 163-173 (1962).

By using the FPC brochure, Mr. Vaughan attempted to use on a wholesale basis transactions which, if presented individually, would not be admitted. Mr. Vaughan did not discriminate, nor do the FPC statistics, between parcels acquired for the other projects by voluntary negotiation, negotiation under threat of condemnation, settlement after commencement of condemnation proceedings or awards by juries. If an individual transaction, say at Albeni Falls, where a jury awarded a given amount for a dairy farm under condemnation, would not be admissible as a comparative sale, how could a composite statistic be admissible which included the court costs, appraisers fees, survey fees and attorney fees for that and perhaps a hundred other diverse transactions?

3. Mr. Vaughan's Opinion Rested on Inadmissible Hearsay

An appraiser must of necessity base his opinion as to value on hearsay. In the instant case, the court ordered the exchange of "comparables" 45 days before the trial, so that the statistics of individual transactions might be verified. (R. Tr. 46-48). The trial judge indicated the proper scope of the exception, by his ruling, not appealed from here, sustaining an objection to the testimony of the PUD's witness, Mr. Ober-

billig, that he had talked to someone in the "Land Office" who told him that certain mining claims were mined out and thus valueless. (R. Tr. 1013-1015). The proper way to prove a transaction, or group of transactions, to be relied upon by an expert as to value, is either (1) to put the sellers and purchasers on the witness stand or (2) to put on a qualified appraiser who has seen the properties, has talked to the principals to establish the voluntary aspect of the sales and has verified the transactions by public records. In contrast, Mr. Vaughan placed reliance on statistics of which little was known. The publication was not self-explanatory. It did not adequately explain who made the judgments as to allocation, on what basis they were made, or what was included in the broad classification, Land and Land Rights. Under these circumstances the statistics were not properly authenticated and were hearsay of the most obvious type. Accordingly, the City objected on that ground. (R. Tr. 1262-1263).

4. Mr. Vaughan's Appraisal of Right to Build a Dam

On direct examination Mr. Vaughan stated that it was "... necessary to appraise the right to build the hydroelectric dam." (R. Tr. 1080).

On cross, he stated again the real subject of this appraisal:

> "I have appraised this as a right to build an existing hydroelectric dam as planned..." (R. Tr. 1131-1132).

The trial judge commented repeatedly that Mr. Vaughan thereby assumed all license rights in the PUD:

> "THE COURT: This man has assumed, in valuing this property, that the person who was buying it had a

license, or could get a license, without any trouble.

* * *

"He valued the property as though there was a license for a Z Canyon, so if he is going to assume that evaluation, – counsel, I am concerned about all of this testimony, . . . " (R. Tr. 1226-1227).

Later on, in ruling on the City's motion to strike, the court said:

"Now, it was my understanding that the valuation that was to be placed on this property for power site purposes was a valuation without a license, without the right at the present time to build and construct a powerhouse, without the right to divert the flow of water for the purpose of developing a hydro energy, and without the right to dam up the river and create a reservoir and back up the water and convert the flow of the river to the use of the condemnee, the PUD, what somebody would pay for the power site as a power site, without those things, having to go out later on and get them.

"I don't think this witness' testimony, counsel, is based upon an acceptable theory of valuation, so I feel I must grant the motion to strike the testimony, so I grant the motion." (R. Tr. 1282).

The hurdles which the PUD, or a purchaser from it, would have had to overcome to acquire the right to construct a dam were:

1. It would have had to obtain an FPC license, which would have involved a showing that the proposed project satisfied all of the requirements of the Federal Power Act. For example, it would have had to show a market for the output of the project, a requirement the PUD itself did not in fact meet. (26 FPC 56, 464.)

2. Sixty to seventy per cent of the uplands necessary for

a Z Canyon project were federally owned. (Tr. 89). The right abutment of the Z Canyon dam site was on federal land. (Ex. P. 80A). The problems which the presence of these federal lands would have posed to a prospective developer of Boundary or Z Canyon were not limited to the direct necessity of obtaining an FPC license. The Department of the Interior, which had jurisdiction over the land in question, expressed, through its Secretary, its unqualified opposition to the construction of any dam in the Boundary-Z Canyon reach of the river. (26 FPC 74). Federal opposition to the project went back at least to 1949. (26 FPC 73).

3. No person or agency could construct a project at Z Canyon without acquiring a bundle of rights and permits from the State of Washington. The PUD, through its purchase from Cooper, obtained certain shorelands in fee and rights to overflow other shorelands. These rights had no value for power site purposes unless the owner also had rights from the State of Washington:

(a) to overflow the *bed* of the Pend Oreille River,

(b) To continuously divert and appropriate waters of the Pend Oreille River for power purposes under state law, and

(c) to impound water in a reservoir.

By the time of the trial, Seattle had obtained these rights. (Ex. P. 21, Tr. 90-91). As shown by the recitals in Ex. P. 21, the State held Seattle's applications in abeyance pending final judicial vindication of its right to condemn. It is thus doubtful whether the PUD or a purchaser from it could

have obtained these permits absent a clear-cut power of condemnation.

4. Any developer would have had to overcome the unqualified opposition of the Pend Oreille Mines & Metals Co., owner of scores of mining properties in the reservoir, (see Ex. P. 40 and 41), to any dam other than possibly a low dam at Z Canyon. (R. Tr. 1582-1596). (Also see Ex. P. 42-52, rejected by the court, R. Tr. 1626).

5. Any developer would have had to face the unqualified opposition of the Bunker Hill Company and its affiliates, including Metaline Contact Mines, (R. Tr. 403-410, R. Tr. 1687), owners of extensive mining properties adjacent to the Pend Oreille River, between Z Canyon and Slate Creek, to *any* power project in the Boundary-Z Canyon reach of the river, including a low dam at Z Canyon. (R. Tr. 1672, 1663, 1670, 1678; Ex. P. 58-76, especially Ex. P. 72; also see Ex. P. 42-48, rejected).

6. Other private property owners were against the construction of any project, including a low dam at Z Canyon, and would not sell voluntarily. (R. Tr. 410-414, Tr. 88).

Under the foregoing facts, to value the PUD's rights as a power site would be to indulge in the wildest speculation. On this point, *United States v. Cooper*, 277 F.2d 857 (5th Cir. 1960) appears to be directly in point. There, the question presented was whether an award for reservoir lands should include any consideration of its use as a potential dam site. Just as here, with respect to a high dam at either Boundary or Z Canyon, the court held:

"We conclude that there was a complete failure of proof that there was a reasonable probability that this land would be used for a dam site within the reasonably near future by any one other than the Federal Government...

* * *

"The only testimony on this issue was given by Mr. B. M. Hall, Jr., a qualified hydroelectric engineer...

* * *

"However, in addition to proof that the land offered a site on which it would be *practicable* to build a dam for the creation of hydroelectric power, it was incumbent on the plaintiffs to prove that there was also a *reasonable likelihood* that it *would* be so used in the *reasonably near future.*"... (Citing cases).

* * *

"An expert witness may give his opinion based on assumptions stated by him. However, if the assumptions needed to support the opinion are not proved, or at least testified to, and are not otherwise taken to be true, the opinion is worthless...

* * *

"...moreover, it was not suggested that all the property could be acquired by private negotiation at any price, much less at a commercially feasible one, without the necessity of resorting to the power of eminent domain. Certainly, there was nothing before the jury that would permit it to find that the lands would be likely to be assembled without use of eminent domain.

* * *

"The record here discloses that the evidence actually submitted fails to provide more than a basis for speculation by the jury, a thing which the Supreme Court in the Olson case said was "to be condemned in business transactions as well as in judicial ascertainment of truth." (277 F.2d 857, at 859-862).

The speciousness of Mr. Vaughan's "bundle of rights" theory, as applied to the PUD's property, is demonstrated further by the difficulties Mr. Vaughan had in postulating a

feasible project on the PUD lands and in saying one could acquire the remaining private lands in the reservoir without paying power site value for other dam sites upstream.

Mr. Vaughan testified that for his "bundle of rights" theory to apply, the owner would have to own the property on which the powerhouse would be constructed. (R. Tr. 1171). This was on Thursday afternoon. The design drawings for Z Canyon which had been introduced by Mr. Allen of Harza Engineering Co. showed the powerhouse on the east side of the river on private property. (Ex. D. 130A). No court was held on Friday. On Monday, Mr. Vaughan expressed the opinion that the powerhouse could be built on either side of the river. (R. Tr. 1219). He stated that he had ignored, in applying his bundle of rights theory, the fact that Mr. Allen had designed a project with the powerhouse on the east side. (R. Tr. 1220). Monday afternoon, Mr. Allen was recalled to state that he had redesigned the Z Canyon project over the weekend (R. Tr. 1303) to move the powerhouse across the river so that it would be safely on PUD property. (R. Tr. 1288). The relocation, to keep it on PUD property, did not provide for future expansion of the powerhouse. (R. Tr. 1296, Ex. D. 142). Yet Mr. Allen had stated on his original direct examination that the FPC always requires that future expansion be provided for in power plant design. (R. Tr. 674).

Still another inconsistency in Mr. Vaughan's approach was his failure to take into account the fact that the project boundaries for a high Z Canyon project would include two dam sites, Slate Creek and Deadman's Eddy, upstream in

the reservoir, both on private property. (See Ex. P. 27, D. 137 as to private ownership). These sites had been proposed to the FPC by the District. (See 26 FPC 114-115, 133, 135, 137). Mr. Vaughan testified that he was aware neither of the Slate Creek site nor the Deadman's Eddy site. (R. Tr. 1130-1141). Obviously, if Mr. Vaughan's bundle of rights theory were tenable as to the acquisition by the City of the upstream Z Canyon site, the theory would apply to the acquisition by the PUD, or one who bought from the PUD, of the Slate Creek and Deadman's Eddy sites. Yet Mr. Vaughan had not taken that factor into account in his $100,000 judgment figure. (R. Tr. 1132-1141). He stated that if plans were drawn for Slate Creek or Deadman's Eddy and they showed development to be feasible, he would consider applying his "bundle of rights" theory, "but unless there is a right to build a dam in that location, I don't see how it can have any basis of valuation." (R. Tr. 1142). This statement was a clear recognition by Mr. Vaughan that his astronomical values derived from "a right to build a dam". His mistaken idea that the PUD owned "a right to build a dam" permeated his entire testimony.

5. Necessity of Right of Condemnation

Mr. Vaughan testified that in forming his opinion as to value, he assumed in the developer the right of condemnation:

> "A I have repeatedly stated that the basic assumption was that anybody who got the permit had the right of condemnation, and I think that is the fact.
>
> Q In any event, that is an essential element, is it not, in your utilization of the bundle of rights evaluation approach?

A Yes." (R. Tr. 1176-1177).

As we have already pointed out, if in assessing a power site and reservoir as an entity it is necessary to consider that the owner must resort to condemnation to put the package together, the property may not be valued as a power site. *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266 (1943). The rationale of the *Powelson* and other cases applying this principle is that neither the federal government nor any governmental agency need compensate a landowner for loss of a right to resort to a condemnation power.

6. Mr. Vaughan's Stricken Testimony Would Have Had No Practical Effect in View of Findings Entered By the Court

We have already pointed out that the rejected testimony of Mr. Allen as to Boundary project (Specification of Error No. 1) would have had no legal effect, if it had been admitted, in view of Finding XI (Tr. 88) not attacked on this appeal. The testimony of Mr. Vaughan, stricken by the court, related solely to value based on use of the properties for a high dam at Z Canyon. (R. Tr. 1097). In Finding XI the court held that a developer of high Z Canyon "could probably not acquire all of these [remaining] properties by voluntary transfer if it be assumed that such developer did not have the power of eminent domain." The PUD thus did not carry its burden of showing, by a preponderance of the evidence, that it was reasonably probable that its property could be devoted to a high Z Canyon project in the reasonably near future. Absent such a showing, Mr. Vaughan's rejected testimony was

"worthless" because it was based on an unproven assumption. *United States v. Cooper*, 277 F.2d 857, 862 (5th Cir. 1960).

C. SPECIFICATION OF ERROR NO. 3 TESTIMONY OF NEVILLE C. COURTNEY (App. Br. p. 41-45)

Several grounds support the court's action in striking Mr. Courtney's testimony as to value:

1. Mr. Courtney picked $7,500,000 as a point off a graph to show what a dam builder *could* feasibly pay for the PUD's lands.

2. His valuation presupposed that a federal license to build and thus use of federal lands was somehow automatically appurtenant to the PUD lands, and that the PUD, moreover, held state derived rights to divert and store the waters necessary to operate a reservoir.

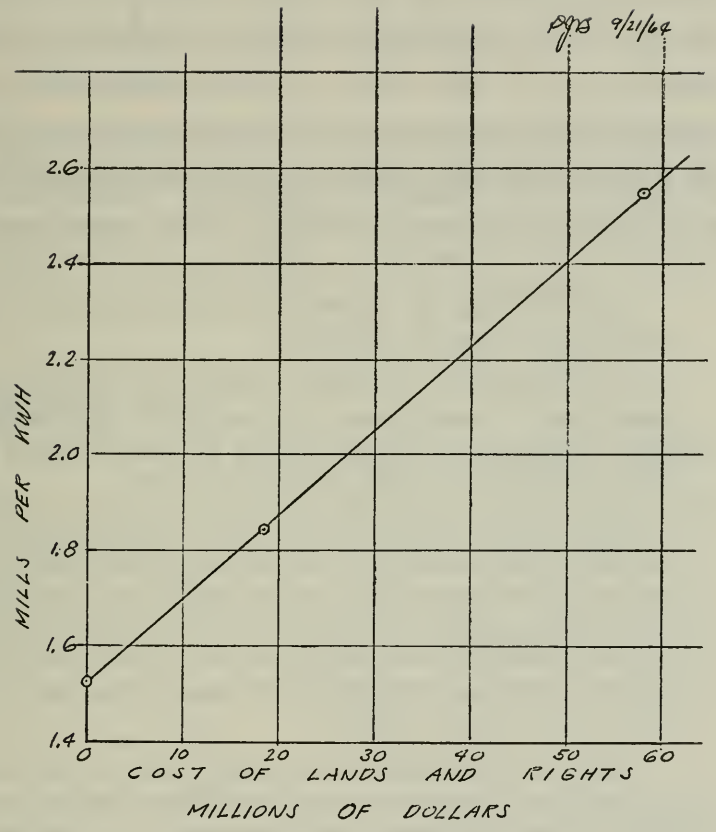
3. He made no analysis and had no comprehension of the problems involved in acquiring the remaining private rights to construct a reservoir.

In addition, as with the testimony of Messrs. Allen and Vaughan, Mr. Courtney's stricken testimony could not have affected the outcome of the case. His valuation was based, in major part, on the unproven assumption that the PUD could build a high dam at Z Canyon without resorting to condemnation. (R. Tr. 1457-1460). For example, in reaching his $7,500,000 figure, he relied upon a report that the project would have a capacity of 550,000 kilowatts, which was the

estimated capacity for Mr. Allen's high dam. (R. Tr. 1396, Ex. D. 130A, p. 2, 6, 7).

1. Mr. Courtney's Use of the "Bleifuss Graph"

Mr. Courtney's value of $7,500,000 (R. Tr. 1398) was derived from use of a graph, similar to one presented by a previous PUD witness, Mr. Bleifuss, and rejected by the court. (R. Tr. 850-851, 858). Mr. Courtney did not present his graph as an exhibit. However, since his description of the graph he used corresponded with Mr. Bleifuss' graph (Ex. D. 134, rejected), we have reproduced Mr. Bleifuss' exhibit in this section of the brief. By looking at this graph the court can fully understand Mr. Courtney's method of valuation.



Z - CANYON
COST OF ENERGY
vs.
COST OF LANDS & RIGHTS

Ex. D. 134 (Rejected)

Mr. Courtney first said he assumed the figures for cost of energy per kilowatt hour computed by Mr. Stenson, an earlier PUD witness, for the costs of a hypothetical plant without land and land rights. He then added a round half million to take care of additional private property acquisitions for the reservoir. (R. Tr. 1459, 1446). He then described his novel method of valuation, which he called "the cost method" which was based on how much could be paid for the property without affecting the economic feasibility of the overall project:

> "I got 2.4 that he [Stenson] had established in mills per kilowatt-hour for no land.
>
> I went up to the 10 million line and I established or found that it would take 2.63 mills per kilowatt-hour. Then I went up to the 20 million line and I found that that would be 2.86 mills per kilowatt-hour.
>
> Now, when I got those curves, I could readily see that adding as much as 20 million dollars into this project for land, the cost would be under 2 mills for High Z Canyon, and it would be under 3 mills for Low Z Canyon. My conclusion immediately there was that it was an extremely valuable computation by using the cost, which I will call the cost method.
>
> I used my judgment as to what point on this curve I should adopt as my fair market value. I knew several things from experience about how much the land would cost, in general, in relation to the cost of the total project, and I finally came down to a final answer that with seven and-a-half million allowed for land, the cost of the power would only be 1.69 mills per kilowatt-hour, and, likewise, if I went over to the Low Z, it would – I haven't that line on here, but it would be approximately, oh, about 2.6 mills per kilowatt-hour." (R. Tr. 1459-1461).

The court commented on Mr. Courtney's method of deriving "market value" from a graph:

"My understanding of the last testimony was that in making up this graph, he added an amount in for land and land rights, and he arrived at a place where it looked like $7,500,000 was a pretty good figure, and that is the value that they put on it." (R. Tr. 1471-1472).

The court asked counsel for the PUD:

"The Court: ...

to base your valuation on what could be paid by somebody and still come out on the basis of the production of electricity, presupposes the issuance of a license, the construction of the plant, the assembling of all the property and the production of electricity at X mills per kilowatt, isn't that right?" (R. Tr. 1484-1485).

2. Use of Federal Lands and State Water Rights in "Bundle of Rights"

It is evident, quite apart from Mr. Courtney's "graph" testimony, that he assumed that much of the value of the PUD lands derived from use of the federal lands, which comprised most of the reservoir acreage. Yet use of this acreage would depend on the granting of an FPC license. This prompted the following exchange between the court and counsel for the PUD:

"THE COURT: You say he will get the government land if he has a license. Aren't you valuing this land, isn't he valuing this land as if he had a license?

"MR. DILL: No, he did not.

"THE COURT: I know he said he didn't, but what would he value it at if he had a license?

"MR. DILL: Well, that is another matter.

"THE COURT: Well, in my humble judgment, that is the way he has valued this land." (R. Tr. 1481).

Mr. Courtney's figure of $7,500,000 actually included a

large but undefined amount for the right to use federal land. He testified:

> "Q Does the figure that you gave us of $7,500,000, represent your opinion as to the value of the dam site and reservoir as an integrated whole?
>
> A Yes." (R. Tr. 1416).
>
> * * *
>
> Q My question is, whether in stating your figure of $7,500,000, whether that is for the overall or unitary value of the dam site and reservoir?
>
> A That is the value for the whole reservoir and dam site." (R. Tr. 1417).

If this theory were carried to its logical extreme, an easement, such as the PUD had for entry to a gaging station, would be worth many millions of dollars, assuming that all of the remainder of the lands necessary for a reservoir were in the federal domain. The easement would represent the entire bundle of non-federal rights necessary to construct the project and would thus, under the PUD's theory, be worth millions.

Mr. Courtney assumed in his valuation not only the right to use federal lands but also that the PUD could convey state permits, it did not have, to divert and store the waters of the Pend Oreille River. Mr. Courtney testified:

> "Q You said, I believe, on direct examination – did you assume that the PUD ownership was of the land and land rights acquired in green on that map? [Exhibit D. 109].
>
> A Yes, from there on up to Box Canyon.
>
> Q Did that include any right to store the water of the Pend Oreille River?

A It was my understanding that it did.

* * *

Q In your consideration of this defendant's exhibit 109, you included the right to divert the waters of the Pend Oreille River through Penstocks or intake structures?

A Yes." (R. Tr. 1423).

Mr. Courtney's assumption that the PUD's right to overflow shorelands included the right to divert and store the waters of the Pend Oreille River was erroneous. Even the PUD in its brief does not quite argue that is acquired *water* rights when it acquired the easement to overflow shorelands from Mrs. Cooper. (App. Br. 52-55). However, because of Mr. Courtney's mistaken assumption and what seems to be confusion in the PUD's brief between land rights and water rights, we shall summarize the applicable facts and legal principles:

1. As the court will see from the language of the 1907 Washington statute quoted at page 99 of the Appendix to the PUD's brief and of the permit given Cooper's predecessor by the State, the right given is to *use the shorelands* for certain purposes, namely, "to perpetually back and hold water upon and over the land hereinafter described, and to overflow any such land and inundate the same..." (Ex. P. 1). This by its terms is an easement to use state land, not a right to appropriate, divert or store water.

2. Section 27 of the Federal Power Act (16 U.S.C. § 821), quoted by the PUD on page 54 of its brief, protecting certain state vested rights, relates to the "control, appropria-

tion, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." It does not refer to rights in property, but in the use of water. Thus in *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 176 (1946) the Court explained the scope of Section 27:

> "The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words "other uses." Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes."

3. If the PUD as owner of shorelands were regarded as a riparian owner, such status would not carry with it any right to the use of the waters of the Pend Oreille River. It is well established in the jurisprudence of Washington that riparian rights do not exist in navigable waters. It was first so held in *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539 (1891). *Eisenbach* has been followed in an unbroken line of authority. In an article entitled *Washington Water Rights – A Sketch*, 31 Wash. L. Rev. 243, 246 (1956), the author, Professor Arval A. Morris stated:

> "... Riparian rights do not exist in navigable water courses, ..."

Also see *Port of Seattle v. Oregon and Washington Railroad Co.*, 255 U.S. 56, 66-67 (1921).

4. The PUD states (App. Br. 53) that before enactment in 1917 of a code in Washingon establishing appropriation rights and procedures, no appropriation was necessary to establish a right to build a dam on the Pend Oreille River. This is incorrect. Chapter CXLII of the Session Laws of 1891 (p. 327) provided a statutory system of appropriation whereby "... as between appropriations the first in time is first in right." This statute is quoted at Horowitz, *Riparian and Appropriation Rights to the Use of Water in Washington*, 7 Wash. L. Rev. 197, 203 (1932).

There is no showing that any predecessor in interest of the PUD ever appropriated the waters of the Pend Oreille River before the passage of the 1917 Water Code, or at any time. Thus the precedessors of the PUD had no water rights which vested before the passage of the Washington Water Code in 1917 or the Federal Power Act in 1920.

In view of the foregoing principles, Mr. Courtney proceeded on a basically incorrect premise when he assumed that the PUD owned the right to appropriate the waters of the Pend Oreille River for power purposes.

3. Failure to Evaluate Acquisition of Remaining Property

Mr. Courtney failed to evaluate in any meaningful way the amount which a dam proprietor would have had to pay for acquisition of the remaining non-federal rights in the area. Mr. Courtney used a judgment figure of $500,000 to clean up the remaining rights in the reservoir. (R. Tr. 1432, 1445). He had no breakdown of this figure (R. Tr. 1429),

nor could he tell what project boundaries he had assumed. (R. Tr. 1430).

The $7,500,000 figure was not obtained, as one might assume, on the basis that a dam builder would pay $7,500,000 for the PUD rights and another $500,000 for the balance of the non-federal property. (R. Tr. 1433). It will be recalled that Mr. Vaughan came to a figure of $8,400,000 for total land value, and then deducted $100,000, a judgment figure for private acquisitions. Mr. Courtney did not do this:

> "Q Do I assume, then, that you came to some figure at some stage in your calculations of 8 million dollars and then reduced it to 7 million, five?
>
> A No, no, no, no. That is not it at all. No, I have never had a figure in my mind of 8 million." (R. Tr. 1433).

One might reasonably ask how he could arrive at the figure of $7,500,000 without making some deduction of $500,000. Maybe the explanation lies in his agreement with the statement that the figure of $7,500,000 represented the value "of the dam site and reservoir as an integrated whole." (R. Tr. 1416). If it did, then Mr. Courtney should have reduced his figure to $7,000,000. But Mr. Courtney made no explanation of this. Nor did his estimate of $7,500,000 include the cost of necessary relocation of mine facilities. (R. Tr. 1434). Yet the matter of mine relocation is not something which someone could reasonably overlook. Impounding of a reservoir to an elevation of 1990 feet above sea level would directly flood the Pend Oreille Mine unless certain facilities were modified. (R. Tr. 1575). When asked

whether he knew that Seattle had been required by FPC in its order, published in 1961, to relocate mine facilities, he replied:

"I wouldn't be at all surprised." (R. Tr. 1435).

D. SPECIFICATION OF ERRORS NOS. 4, 5 and 7 (App. Br. 45-46, 49)

These specifications appear to be purely formal, with no argument of substance and no citation of authority whatsoever. Since specifications 5 and 7 are not argued separately from other contentions, we make no separate reply.

In specification 4 the District states that it was incumbent upon the City, after the PUD's evidence was stricken, to put in additional evidence of value. The PUD contends that Seattle's witnesses ignored power site value. (App. Br. 45). This is incorrect. Messrs. Butler and McQuigg inspected numerous hydro plants in the Northwest and analyzed many transactions in connection with the property acquired for the projects. (R. Tr. 90-97, 250-257). They considered very carefully the possibility that lands in reservoirs might bring a premium on such account. They found no such increment in value to have been paid for uplands or shorelands. (R. Tr. 97, 119, 248). One of the City's witnesses as to value, Mr. Butler, had had extensive past experience in appraising properties to be used in reservoirs (R. Tr. 82), and presented data concerning comparable transactions, including properties used for abutments of large dams. (R. Tr. 109-120).

After a thorough analysis of the subject, Messrs. Butler and McQuigg concluded that the adaptability of the PUD's

property for reservoir purposes did not enhance its value for its otherwise highest and best use, reforestation. (R. Tr. 134, 241).

POINT II

PUD IS NOT ENTITLED TO SEVERANCE DAMAGE SPECIFICATION OF ERROR NO. 6

(App. Br. 46-48)

The PUD contends that the trial judge erred in rejecting, in pretrial proceedings, its claim to severance damages and states that this error was compounded by his refusal to hear evidence in support of the claim.

First, we should consider what the PUD means by severance damages. Part of its upland tract was taken. Conceivably there could have been damage to the portion not taken. But the PUD's own witnesses testified that this tract was worth as much after the take as it was before. (Vaughan R. Tr. 1097, Courtney R. Tr. 1399).

The PUD's theory of severance was that it was entitled to be compensated, as its counsel put it, for backing up the water on Box Canyon. (R. PCF 50, 62-64). In its pretrial contentions, which were rejected by the court, the PUD sought compensation for the backwater effect which the Boundary project would have on the Box Canyon project. (Tr. 46).*

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*Diminution in output of an upstream project by the overlap of a downstream hydroelectric project was considered in *Public Utility Dist. No. 1 of Douglas County v. FPC*, 242 F.2d 672 (9th Cir. 1957).

The parties reached an agreement on December 20, 1965, after the filing of the PUD's opening brief, settling the matter of compensation to be paid the District for encroachment. The parties have stipulated that this court may consider the agreement on this appeal. A copy of the stipulation and agreement is attached to this brief as Appendix "A". The court's attention is invited to the following paragraph:

"6. Upon the properly authorized execution of his agreement by the parties hereto, the claim made by PUD in the aforementioned condemnation action with reference to the destruction of production capacity of Box Canyon Dam by reason of encroachment by the Boundary Project Reservoir and referred to above shall be deemed settled and eliminated from said condemnation action without prejudice to any and all other claims and contentions asserted by PUD in said condemnation action..."

In view of the foregoing agreement and in view of the uncontroverted testimony that no damage was incurred to the remaining part of the PUD's uplands by reason of the partial taking, we are unable to divine any issue remaining in the case relating to "severance". Any damage beyond encroachment loss or damage to the remaining uplands would be damages for the fact that the Federal Power Commission decided to license Boundary to the City, rather than Z Canyon to the District. Clearly, it was the order of the FPC and not the taking of the PUD's properties which prevented the District from constructing the Z Canyon project and integrating its operation with Box Canyon.

In the *Grand River Dam Authority* litigation, referred to repeatedly in the PUD's brief, the Authority proposed a three dam development of the Grand River in Oklahoma. The Grand River, itself, was not navigable, but its flow affected the navigable Arkansas River. The United States determined to develop one of these sites. The Authority claimed that it was entitled to compensation for dam site value and also severance damages to its two upstream projects. The Court of Claims held that it was entitled to compensation for its water power, which holding was reversed by the United States Supreme Court. However, on the issue of severance damages the Court of Claims said in *Grand River Dam Authority v. United States*, 175 F. Supp. 153, 157 (Ct. Cl. 1959):

> "As to the items of severance damages, we believe that these were in the nature of indirect or consequential damages and therefore not compensable. *Mitchell v. United States*, 267 U.S. 341, 45 S. Ct. 293, 69 L. Ed. 644; *Omnia Commercial Company v. United States*, 261 U.S. 502, 43 S. Ct. 437, 67 L. Ed. 773."

In its reversal of the Court of Claims holding that the Authority was entitled to compensation for the taking of water power, the United States Supreme Court said, in *United States v. Grand River Dam Authority*, 363 U.S. 229, 233 (1960):

> "... When the United States appropriates the flow either of a navigable or a nonnavigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one. Plainly under our decisions it could license another to build the project and operate it. *If respondent*

sued for damages for failure of the Federal Government to grant it a license to build the Ft. Gibson project, it could not claim that something of right had been withheld from it. So it is when the United States exercises its prerogative by building the project itself." (emphasis supplied).

It, therefore, follows that the PUD may not do by indirection what it cannot do directly, namely, recover compensation for the exercise by the United States of its sovereign prerogative granted to it by the Commerce Clause of the Constitution, Article I, Sec. 8, cl. 3 Also see *United States v. Willow River Power Co.*, 324 U.S. 499 (1945).

The PUD's claim for "severance" is, moreover, essentially a claim for damages for frustration of its business plans to construct Z Canyon. The United States Supreme Court passed on a closely analogous point in *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960). There, as we have seen, the Court overruled the Court of Claims and held that no compensation for power site value was payable because there was no taking of an existing power project, only a prospective project. The Court observed:

"The Court of Claims erred in failing to distinguish between an appropriation of property and the frustration of an enterprise by reason of the exercise of a superior governmental power. Here respondent has done no more than prove that a prospective business opportunity was lost. More than that is necessary as Omnia Commercial Co. v. United States, 261 U.S. 502, 67 L. ed. 773, 43 S Ct 437, holds. In that case the claimant stood to make large profits from a contract it had with a steel company. But the United States, pursuant to the War Power, requisitioned the company's entire steel production. Suit was brought in the Court of Claims for just

> compensation. The Court, after pointing out that many laws and rulings of Government reduce the value of property held by individuals, noted that there the Government did not appropriate what the claimant owned but only ended his opportunity to exploit a contract. 'Frustration and appropriation are essentially different things.' Id. 261 US at 513. And see Mitchell v. United States, 267 US 341, 345, 69 L. ed. 644, 648, 45 S Ct 293; United States ex rel. Tennessee Valley Authority v. Powelson, 319 US 266, 281-283, 87 L ed 1390, 1400-1402, 63 S Ct 1047. No more need be said here." (363 U.S. at p. 236).

Also see *Winn v. United States*, 272 F.2d 282 (9th Cir. 1959); *United States v. 561.14 Acres of Land*, 206 F. Supp. 816, 825-826 (W.D. Ark. 1962).

The PUD was made whole for any possible damage to Box Canyon by the encroachment agreement, Appendix "A" hereto. Its fanciful claim that it is entitled to something more on the basis that Box Canyon and Z Canyon were part of the same integrated plant and system was disposed of by the Federal Power Commission (26 FPC 65), and concluded against it by the District of Columbia Court of Appeals.

That court, in the direct review proceedings from the FPC orders, passed on the matter and held:

> "... For, it does not appear that the land owned by PUD and needed by Seattle is a part of the former's electric plant or system which the Washington statute protects from condemnation by a city or town. The record does not show that the property here involved is used by PUD in its operations, or that in the future it will be useful to PUD in any way except in connection with its Z Canyon project which has been foreclosed by the grant of the license to Seattle. So, after

the City's license is finally affirmed and it begins condemnation, the site now owned by PUD will not be in any sense a part of its electric plant or system and the State statute, even if in this situation it were effective according to its terms, would not prevent Seattle from condemning the needed land." (308 F.2d 318, 323).

POINT III

PUD'S CASE FOR POWER SITE VALUE FAILED BECAUSE OF ITS FAILURE TO SHOW REASONABLE PROBABILITY OF DEVOTING PROPERTY TO RESERVOIR USE

In pretrial proceedings the District Judge ruled that he would permit the PUD to show that "in the reasonably near future it could utilize this property for power site purposes." (R. HPO 130). The judge reminded the PUD of this ruling during the argument on the City's motion to strike Mr. Vaughan's testimony. (R. Tr. 1281). The court entered findings to the effect that a developer of either the Boundary or Z Canyon site could not put the remaining properties together without condemnation, except for a Z Canyon project to a pool elevation of 1885 feet. (Tr. 88, 94-95).

The PUD does not challenge any of the court's findings in its specification of errors. Hence, it is accepted as verity on this appeal that the PUD could not be awarded power site value, in any event, except for such power site value as might inhere in the possibility of constructing a low dam at Z Canyon.

Any claim that a purchaser of the PUD's rights would pay for the "power site value" of low Z Canyon would be

pure speculation. Anyone who would buy the PUD property on the prospect of building a low dam at Z Canyon would be relying on the assumption that the Federal Power Commission would ignore its obligation to "promote the comprehensive development of the water resources of the nation . . ." *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 180-181 (1946). It is possible that the Commission might license a dam to be built in stages. But it seems unlikely in the extreme that the Commission would license a project at Z Canyon and thus destroy the irreplaceable water resource between Z Canyon and the Canadian border. There can be no doubt, as found by the FPC examiner, that the Boundary and Z Canyon sites are mutually exclusive. (26 FPC 61). The Commission confirmed the examiner's finding that Boundary project, to elevation 1990, was the optimum development of the reach of the Pend Oreille River from Box Canyon to the border. (26 FPC 54, 139-140, Finding 101). There is no market for the second best site in a navigable reach of a river, controlled by FPC, which is committed to full development by its charter, the Federal Power Act. The only reason the PUD acquired uplands at Z Canyon was because they happened to be included in a package of rights they needed for Box Canyon.

POINT IV

VALUATION METHODS USED BY *GRAND HYDRO* AND *TWIN CITY* APPRAISERS WERE NEVER JUDICIALLY APPROVED AND WERE, IN ANY EVENT, DIFFERENT THAN THOSE EMPLOYED BY PUD APPRAISERS

The PUD contends that it tailored its valuation testimony

to fit testimony of similar character in litigation known as the *Grand Hydro* and *Twin City* cases (App. Br. 57-63).

The PUD cites three opinions on page 61 of its brief relating to *Grand Hydro*. It then quotes from the two opinions of the Oklahoma Supreme Court (139 P.2d 798 and 201 P.2d 225), and from the opinion of the United States Supreme Court (335 U.S. 359) (App. Br. 61-62). None of these quotations constitutes an approval of the *methods* used by the appraisers. Rather, there is no discussion anywhere in any of the three opinions as to the methods used. The quotations indicate nothing more than a holding that *Grand Hydro* was, under the facts, entitled to power site value. The sole issue before the United States Supreme Court was whether power site value was payable. The Court held, 5-4, that it was. Nowhere, either in the United States Supreme Court opinion, or in the opinions of the Oklahoma court, is there any discussion of the propriety of the valuation *methods* used by any expert witness.

We turn now to the five opinions in the *Twin City* litigation cited by the PUD at page 58 of its brief. The PUD points out that ultimately the United States Supreme Court (350 U.S. 222) reversed the lower court holdings that the landowner was entitled to power site value. (App. Br. 60). Hence, the United States Supreme Court had no occasion to pass upon the propriety of any of the valuation testimony relied upon by the District as analogous here. We also note that in neither of the Circuit Court of Appeals opinions (215 F.2d 592 and 221 F.2d 299) is there any discussion

of the valuation methods used by the landowners' experts. The sole challenge by the Government to this testimony appears to have been, that as a matter of law, no power site value was payable. The only District Court opinion which explains the *method* of valuation is that of Judge Wyche at 114 F. Supp. 719. Here again, the Government does not appear to have challenged the valuation methods used by the experts. It is, therefore, difficult to understand how Judge Wyche's opinion can be construed as approval of these methods. The *methods* used were not in issue. Moreover, it appears that the Commissioners, whose report was reviewed by Judge Wyche, relied primarily upon the testimony of Dr. William P. Creager. (114 F. Supp. 724). The PUD describes the method used by Dr. Creager, adopted by the Commissioners:

> "Dr Creager determined that the annual cost of producing hydro power at a contemplated project on the undeveloped lands was $139,000 less than the annual cost of producing a like amount of power by steam. He capitalized this sum at 6 percent, which gave the potentially-integrated power site a theoretical value of approximately $2,3000,000." (App. Br. 59).

Thus, the crucial testimony in *Twin City* was a capitalization of benefits method based on a comparison with a hypothetical steam plant.

The PUD, in this case, however, informed the court before its value witnesses commenced their testimony that it was not employing the capitalization method. (R. Tr. 528-529).

Later, Mr. Vaughn, the PUD's principal witness as to value, testified that he did not deem either the steam comparison method which he called the "theory of substitution" (R. Tr. 1081) or the capitalization of income method (R. Tr. 1084) to be appropriate. Mr. Courtney, the PUD's other value witness, also testified that he discarded the steam comparison and capitalization of income approaches as improper. (R. Tr. 1419, 1444). Mr. Courtney testified on direct that his valuation in the *Twin City* case was worked out on the basis of capitalization of earnings, to which he applied a judgment factor. (R. Tr. 1391).

Since the basic method which was used by the witnesses in *Twin City* was discarded by the PUD's value witnesses, the *Twin City* testimony does not constitute a precedent of any sort for the methods used in this case.

POINT V

THE "TAKING" OF THE POWER VALUE OF THE PUD'S PROPERTIES IS NOT COMPENSABLE BECAUSE OF THE FEDERAL NAVIGATION SERVITUDE

The City's contention, set out in the Pretrial Order, that no power site value should be included in the award to the PUD because of the federal navigation servitude (Tr. 41-42) was overruled by the District Judge in the hearing on the Pretrial Order. The judge said, "I don't think that the dominant servitude has been shown to control here, that the licensee is in a different position than the sovereign." (R. HPO 130).

The application of the federal navigation servitude doctrine to the instant proceedings is the subject of the City's cross appeal. To avoid repetition, we ask the court to consider our argument in support of our cross appeal as an additional ground upholding the judgment below. In other words, if the court upholds the application of the doctrine to the PUD's property, the various specifications of error of the District concerned with admissibility of the testimony of their witnesses concerning power site value need not be considered. If the doctrine applies, the testimony of the PUD's witnesses concerning power site value was properly rejected on the ground that under the doctrine no compensation is payable for power value.

PART TWO
OPENING BRIEF OF CITY AS APPELLANT

JURISDICTION

This is a cross appeal from entry of judgment in favor of the landowner in a condemnation proceeding under Section 21 of the Federal Power Act (16 U.S..C § 814). This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

The sole issue involved in this cross appeal is whether the trial judge correctly included in the award to the landowner, PUD, amounts for its property interests lying below the line of ordinary high water. If this court sustains our view, no further proceedings will be necessary to determine the correct amount of compensation, since the findings entered by the trial court set separate values on each of the

interests owned by the PUD. The court found the fair market value of the uplands taken to be $1,430.00 and of the easement to the gaging stations to be $1.00. (Tr. 94). Hence, full compensation to the PUD for all of its property above the line of ordinary high water would be $1,431.00. The City proposed conclusions of law, at the end of the case, which, if adopted, would have recognized the application of the federal navigation servitude doctrine and would have provided that the PUD was entitled to $1,431.00 for its property interests. (Tr. 51-52).

SPECIFICATION OF ERRORS

1. Allowance of compensation to the PUD for its interests in shorelands lying below ordinary high water of the Pend Oreille River. (Tr. 95, 96).

2. Rejection of the following Conclusions of Law proposed by the City:

"V

The "taking" of the power value of defendant's properties is not compensable because of the applicability of the federal navigation servitude doctrine. Because of the application of said doctrine aforesaid, defendant is not entitled to compensation of any sort for any of its property interests lying below the line of ordinary high water of the Pend Oreille River.

VI

Defendant is entitled to compensation in the amount of One Thousand Four Hundred and Thirty-One Dollars

($1,431.00) for the taking by plaintiff of defendant's property and property interests set forth and described in paragraph IX of the Findings of Fact herein, which sum includes the damage to the portion of Parcel 1 which is not taken." (Tr. 51-52).

SUMMARY OF ARGUMENT

1. The federal navigation servitude precludes compensation for any lands lying below the line of ordinary high water of a navigable stream. The same doctrine precludes compensation for water power value of lands adjacent to a navigable stream, but lying above the line of ordinary high water.

2. Seattle, as agent and licensee of the United States under the Federal Power Act, in exercising rights under Section 21 of that Act (16 U.S.C. § 814) is vested with the full measure of the federal power of eminent domain. The "taking" of the property interests of the PUD lying below ordinary high water by Seattle is, therefore, in law the act of the federal government and is not compensable. Likewise, the "taking" of water power value of the PUD uplands is non-compensable.

POINT I

THE FEDERAL NAVIGATION SERVITUDE PRECLUDES ANY COMPENSATION FOR SHORELANDS AND ANY WATER POWER VALUE FOR UPLANDS

Two recent decisions by the United States Supreme Court have crystallized the doctrine of the navigation servitude as

it applies to projects authorized by the federal government in aid of interstate and foreign commerce. The first confirmed the fact that compensation is precluded for any water power value of lands adjacent to a navigable stream but above the line of ordinary high water. *United States v. Twin City Power Co.*, 350 U.S. 222 (1956). The second confirmed the rule that no compensation is payable for interests lying below that line. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624 (1961).

In the *Twin City* case, the United States, in execution of a congressionally approved project for the comprehensive development of the Savannah River Basin (§ 10 of Flood Control Act of 1944, 58 Stat. 887), condemned certain uplands along the navigable Savannah River owned by the Twin City Power Company, which had acquired them for the development of a power project. The District Court and Court of Appeals (Fourth Circuit) included in the compensation awarded for the land an amount for the value of the land as a prospective hydroelectric power site. The Supreme Court, speaking through Justice Douglas for a five member majority, reversed, holding that compensation need not be paid for the asserted water power value of the company's lands above high-water mark because of a superior dominant navigation servitude:

> "The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called 'a dominant

servitude' [citations] or a 'superior navigation easement' ..." (p. 224-25).

The Court quoted as controlling the earlier case of *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) wherein it had been said:

> "...'Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable'..." (350 U.S. at 226).

While four Justices, Burton, Frankfurter, Minton and Harlan dissented in *Twin City*, the subsequent 1961 decision of the Court in the *Virginia Electric & Power Co.* case, makes it clear that the navigation servitude doctrine of *Twin City* is now accepted law. All of the Justices, majority and dissenters, in the *Virginia Electric* case were agreed that the navigation servitude doctrine precluded payment of compensation on construction of a federal project in a navigable stream for power value of fast lands adjacent to a stream above ordinary high water, or any compensation for lands or interests below the ordinary high-water mark:

> "...A classic description of the scope of the power and of the privilege attending its exercise is to be found in the Court's opinion in United States v. Chicago, M. St. P. & P. R. Co.:
>
> " 'The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. [Citing cases.] The damage

> sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.'. . ."
>
> * * *
>
> "But though the Government's navigational privilege does not extend to lands beyond the high-water mark of the stream, the privilege does affect the measure of damages when such land is taken. In United States v. Twin City Power Co. 350 U.S. 222, 100 L ed 240, 76 S Ct 259, we held that the compensation awarded for the taking of fast lands should not include the value of the land as a site for hydroelectric power operations. It was pointed out that such value, derived from the location of the land, is attributable in the end to the flow of the stream – over which the Government has exclusive dominion. 350 U.S. at 225-227. Thus, just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss [citations] it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated. (365 U.S. at 628, 629.)

Thus since the navigation servitude doctrine of the *Twin City* and *Virginia Electric & Power Co.* cases applies to the PUD's property interests, it is clear (1) that no compensation is payable for any power value of such properties, and (2) that no compensation whatever need be paid for any of the PUD's shoreland interests, which by definition are below the ordinary high-water mark of the Pend Oreille River. The principle of these cases has long been followed by this court. *Washington Water Power Co. v. United States*, 135 F.2d 541 (9th Cir. 1943), *cert. den.* 320 U.S. 747 (1943); *Continental Land Co. v. United States*, 88 F.2d 104 (9th Cir. 1937), *cert. den.* 302 U.S. 715 (1937).

The only question, not passed upon by the foregoing authorities, which might distinguish them from the instant case is whether the navigation servitude doctrine applies to condemnations under section 21 of the Federal Power Act. For the reasons to follow, we believe that the doctrine applies equally to the federal government and to agencies to whom it delegates its powers, such as the City of Seattle.

POINT II

THE NAVIGATION SERVITUDE APPLIES TO CONDEMNATIONS UNDER SECTION 21 OF THE FEDERAL POWER ACT

While the matter has never been squarely adjudicated, analysis of the Federal Power Act and analogous precedents leaves no doubt that the navigation servitude is applicable to Seattle's condemnation under section 21 of the PUD properties.

It is now conclusively established that section 21 confers *federal* eminent domain powers on licensees. *Public Utility District No. 1 of Pend Oreille County v. FPC*, 308 F.2d 318, 321-323 (D.C. Cir. 1962), *cert. den.* 372 U.S. 908 (1963); *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960); and *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340 (1958).

The District of Columbia Circuit in its opinion in the direct review proceedings from the FPC orders upon which the instant section 21 proceeding is based quoted the following language from the *Tacoma* case:

> "We believe that respondents' construction of this language is in error. The questioned language expressly refers to possible "indebtedness limitations" in the City's Charter and "questions of this nature," *not to the right of the City to receive and perform, as licensee of the Federal Government under the Federal Power Act, the federal rights* determined by the Commission and delegated to the City as specified in the license. * * *' (Emphasis added.)" (308 F.2d at 322-23).

The Circuit Court then concluded:

> "What precedes makes it clear that the State statute here involved, even if according to its own terms it is applicable, cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute. Were it otherwise – i.e., if indeed the limitation of the state-granted right of eminent domain prevented the exercise of *federally-granted power of condemnation* in the area proscribed by it – PUD's argument that it disables Seattle in this situation could not be upheld." (Emphasis added.) (308 F.2d at 323).

If any doubt remained that Seattle was invested with federal rights which permitted it to do all things in the execution of its federal license which the United States might do itself, it was dispelled by the United States Supreme Court's summary reversal of the Washington Supreme Court in *Seattle v. Beezer*, 376 U.S. 224 (1964). There, the Court upheld Seattle's right to take the PUD's property in these proceedings, despite the conclusion of the Washington Supreme Court that a state statute forbade the taking. The action of the Court should be interpreted to mean that Seattle, in these Section 21 proceedings, stands in the shoes of the federal government, and becomes for this purpose a federal instrumentality.

The Second Circuit in *Tuscarora Nation of Indians v. Power Authority of New York*, 257 F.2d 885 (2nd Cir. 1958), *cert. den.* 358 U.S. 841 (1958), recognized that a licensee, in bringing section 21 proceedings is an agency of the federal government. There the court said:

> "The direction to the Federal Power Commission was specific, namely, 'to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara Power permitted to be used by International agreement.' The licensee by virtue of section 814 [section 21 of the Federal Power Act] becomes vested with the governmental power of eminent domain. The exercise of the right is thus the act of an agency of the sovereign." (257 F.2d at 894).

It is thus now firmly established that Congress delegated in section 21 the full measure of its federal eminent domain powers. Earlier cases had made it abundantly clear that Congress may delegate its eminent domain powers to non-federal agencies. *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, 616 (M.D. Ala. 1922)[1]; *Missouri v. Union Elec. Lt. & Power Co.*, 42 F.2d 692, 698 (W.D. Mo. 1930) (condemnation action under section 21 as against state-owned land devoted to public use); see also *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 656-658 (1890) (exercise of eminent domain power of national government by railroad corporation against Indian lands);[2] *Thatcher v. Tennessee*

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[1]Cited with approval in *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 at 176 (1946).

[2]Cited with approval in *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 at 121-122 (1961).

Gas Transmission Co., 180 F.2d 644, 647-648 (5th Cir. 1950), *cert. den.* 340 U.S. 829 (delegation of federal eminent domain powers to natural gas company under section 7(h) of Natural Gas Act paraphrasing section 21 of Federal Power Act); *Latinette v. City of St. Louis*, 201 F. 676 (7th Cir. 1912) (City of St. Louis, Mo. authorized as federal agent to condemn land in Illinois for bridge across Mississippi River); *City of Davenport v. Three-Fifths of an Acre of Land*, 147 F. Supp. 794 (S.D. Ill 1957), aff'd 252 F.2d 354 (7th Cir. 1958) (City of Davenport, Iowa, held the exclusive donee of federal eminent domain power over navigable waters to take land in Illinois dedicated to a public use for interstate bridge). In *Nichols on Eminent Domain* (3rd Ed.), section 2.15, the principle of these cases is summarized as follows:

> "... In such cases Congress may create its own instrumentalities or use those already existing and it may give to a corporation organized under authority of a state power which the state did not give it and could not constitutionally have given it."

The conclusion is inescapable that Congress in delegating its federal eminent powers to licensees under the Federal Power Act granted its full navigation servitude powers.

First, the language of the Act specifically confers eminent domain powers for the purpose of developing navigable waterways. Section 21 of the Federal Power Act expressly authorizes licensees to exercise a right of eminent domain to acquire –

> "... the lands or property of others necessary to the construction, maintenance, or operation of any dam,

> reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvment *which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce* ..." (16 U.S.C. § 814; Emphasis supplied.)

The federal government, through the Federal Power Commission, has determined the necessity of the taking under section 21. In issuing a license to Seattle for the Boundary project, the Commission expressly found, in the terms of the Act, that:

> "... The Boundary Project as hereinafter authorized is best adapted to a comprehensive plan for this development of the Pend Oreille River for the use or benefit of interstate or foreign commerce, for the improvement and utlilization of water power development, and for other beneficial public uses, including recreational purposes." (26 F.P.C. 54, at 139-140).

The language of section 21 authorizing condemnation for projects for "improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce" must be read with reference to section 4(e) of the Act which grants to the Commission Congress' full authority over navigable waters for the purposes of the Act. Section 4(e) expressly authorizes the Commission to issue licenses:

> "... for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and *improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate*

commerce with foreign nations and among the several States . . ." (16 U.S.C. § 797(e); Emphasis supplied.)

The Supreme Court has held that Section 4(e) is an exercise by Congress of its navigation servitude powers:

> "The respondent is a riparian owner with a valid state license to use the natural resources of the state for its enterprise. Consequently it has as complete a right to the use of the riparian lands, the water, and the river bed as can be obtained under state law. The state and respondent, alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purposes of commerce. The power flows from the grant to regulate, i.e., to 'prescribe the rule by which commerce is to be governed.' This includes the protection of navigable waters in capacity as well as use. This power of Congress to regulate commerce is so unfettered that its judgement as to whether a structure is or is not a hindrance is conclusive. Its determination is legislative in character. The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion.
>
> "Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license. This power is exercised . . . through section 4(e) of the present Power Act, 16 USCA § 797(e)." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 423-24 (1940).

The Court in the *Appalachian* opinion cited and relied upon *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913), the case which, in turn, was a forerunner of *Twin City*.

Second, the language of section 21 enacted in 1920 conferring federal eminent domain powers "for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commence" is similar to the language of section 11 of the Act of March 3, 1909 (35 Stat. 815, 820) construed by the Supreme Court in *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, (1913), as an exercise of the navigation servitude. Section 11 of the 1909 Act authorized the condemnation of lands near the navigable St. Marys River, Michigan, as "necessary for the purposes of navigation of said waters and the waters connected therewith." Thus when Congress in 1920 inserted a phrase having a similar reference to the direct use of Federal Commerce Clause powers in section 21, it must have intended the full use of such powers in furtherance of the "vigorous determination of Congress to make progress with the development of the long idle water power resources of the nation..." *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 171 (1946).

One of the earliest cases which recognized that the delegation of federal powers to non-federal agents may include the navigation servitude was *Stockton v. Baltimore & N.Y.R. Co.*, 32 F. 9 (C.C.D. N.J. 1887) * by Justice Bradley while

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*Cited with approval in *United States v. California*, 332 U.S. 19, 30 (1947); *United States v. Carmack*, 329 U.S. 230, 240 (1946); *United States v. Wayne County*, 252 U.S. 574 (1920), *affirming* 53 Ct. Cls. 417 (1919); *Luxton v. North River Bridge Co.*, 153 U.S. 525, 532 (1894); *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641 (1890).

on Circuit. This was a suit by the Attorney General of New Jersey for an injunction to restrain a private transit company and railroad company from erecting a bridge between New Jersey and Staten Island in New York across navigable waters, to be situated on state owned lands on the shore and under the water. The companies claimed the right to build the bridge under an act of Congress. The state objected on the ground, *inter alia*, that its lands were being taken without compensation. Justice Bradley, after ruling that Congress could confer its power to construct a bridge across a navigable stream for the furtherance of commerce among the states to a private corporation, and that these powers could be exercised without the consent of the state, held that no compensation was payable to the state for the taking of its lands because of the navigation servitude. Also see *People v. Hudson River Connecting Railroad Corp.*, 186 App. Div. 602 (3rd Dept.), *aff'd* 228 N.Y. 203, 126 N.E. 801, *cert. den.* 254 U.S. 631 (1920).

While the question presented by this appeal has never been ruled on by the United States Supreme Court, *Grand River Dam Authority v. Grand Hydro*, 335 U.S. 359, 373 (1948) seems to foreshadow the view which the Court might take of the instant question. While that case involved only an exercise of state eminent domain powers on a non-navigable stream, and not the exercise, as here, of federal eminent domain powers on a navigable stream, four of the justices, in dissent, viewed the Federal Power Act, *per se*, as an exercise of Congress' navigation servitude powers to preclude anyone, not holding a federal license, from claiming water power un-

der state law. In that case, the Grand River Dam Authority, a public agency of the State of Oklahoma, sought to condemn lands owned by Grand Hydro, a private utility, held for hydropower purposes adjacent to a non-navigable stream. The Authority, while it held a license from the Federal Power Commission to build its project, chose to condemn the lands in the state courts under state law, rather than to exercise its section 21 powers. The Oklahoma Supreme Court held that, as a matter of state law, power site valuation had to be paid. The United States Supreme Court affirmed on the ground that nothing in the Federal Power Act could be said to supersede specifically the state law in this situation. However, the majority expressly reserved opinion as to the result if the action had been brought under section 21:

> "If either the United States, *or its licensee as such,* were seeking to acquire this land under the Federal Power Act, it might face different considerations from those stated above. The United States enjoys special rights and power in relation to navigable streams and also to streams which affect interstate commerce. The United States, however, is not a party to the present case. It is not asserting its right to condemn this land. The petitioner, likewise, is not seeking to enforce such rights as it might have to condemn this land by virtue of its federal license. Accordingly, we express no opinion upon what would be the appropriate measure of value in a condemnation action brought by the United States *or by one of its licensees* in reliance upon rights derived under the Federal Power Act." (335 U.S. 359, 373) (Emphasis supplied).

In spite of the fact that the majority opinion carefully reserved federal rights on the exercise of federal eminent domain powers, and further that only a non-navigable stream

affecting a downstream navigable stream was involved, four justices dissented. Justice Douglas, joined by Justices Black, Murphy and Rutledge, observed:

> "The result of this decision, no matter how it is rationalized, is to give the water-power value of the current of a river to a private party who by reason of federal law neither has nor can acquire any lawful claim to it. The United States has asserted through the Federal Power Act its exclusive dominion control over this water power. That Act specifies how one may acquire a license to exploit it, § 23(b), 16 USCA § 817, 5 FCA title 16, § 817, and the conditions under which the licensee must operate. See *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 90 L. Ed. 1143, 66 S. Ct. 906.
>
> "Petitioner has such a license. Respondent has none and, for reasons unnecessary to relate here, concededly cannot obtain one. Respondent therefore has no claim to the water-power value which the law can recognize, if the policy of the Federal Power Act is to be respected ..." (pp 375-76).

The dissent is significant in that it gives a strong indication of the possible result had the case involved an exercise of federal eminent domain powers. The more recent development of the doctrine of the navigation servitude by *United States v. Twin City Power Co.*, 350 U.S. 222 (1956) and *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961), indicates the trend of the Court's view.

The opinion of the Court in the *Virginia Electric & Power Co.* case left no doubt as to the status under the navigation servitude doctrine of property rights below high water. All nine justices, in three separate opinions, agreed that no compensation was payable for the "taking" of such rights. The

three dissenting justices urged that the majority did not go far enough. In their view the servitude precluded compensation for an easement over fast lands as well as the shorelands and bed of the river. Justice Douglas, concurring with the majority, noted that the sole subject of controversy was over the status of the lands above high water. It was conceded by all that no compensation was payable for property lying below high water. Justice Douglas quoted in this connection from *United States v. Willow River Power Co.*, 324 U.S. 499, 509 (1945):

> " 'High-water mark bounds the bed of the river. Lands above it are fast lands and to flood them is a taking for which compensation must be paid.' " (365 U.S. 637).

While Justice Douglas did not quote further from the *Willow River* case, the opinion in that case continues:

> "But the award here does not purport to compensate a flooding of fast lands or impairment of their value. Lands below that level are subject always to a dominent servitude in the interests of navigation and its exercise calls for no compensation." (324 U.S. 509).

In the majority opinion in the *Virginia Electric & Power Co.* case, Justice Stewart made it clear that no compensation is payable for property interests below the high water mark. After quoting an earlier holding (*United States v. Chicago, M. St. & P. R. Co.*, 312 U.S. 592 (1941)) he wrote:

> "Since the privilege or servitude only encompasses the exercise of this federal power with respect to the stream itself and the lands beneath and within its high-water mark, the Government must compensate for any

taking of fast lands which results from the exercise of the power." (365 U.S. 628).

The PUD fee-owned shorelands and the shorelands over which it held an overflow easement, described in the findings as Parcel 2 and Parcel 3, respectively (Tr. 86-87), are by definition, below the line of ordinary high water. RCW 79.01.032 defines second-class shorelands as:

> "... bordering on the shores of a navigable ... river ... between the line of ordinary high water and the line of navigability ..."

It follows that the District Judge erred in including in the award to the PUD compensation for the "taking" of the shoreland rights.

CONCLUSION

Congress, acting through the Federal Power Commission, has by its orders granting Seattle a license, made Seattle its agent for purposes of acquiring property under section 21 necessary to construction of Boundary. Consequently, no power site valuation need be paid (nor any compensation at all for interests in the shorelands), because of the navigation servitude to which such properties are subject. The PUD, its predecessor, Colonel Cooper, and his predecessor, the State of Washington, all held the shorelands subject to the superior right of the federal government to use them to improve commerce. The exercise of that right, through Seattle as an agent or instrumentality of the federal government, creates no occasion for compensation. Therefore, the decree

below should be modified to exclude from the award compensation for the shoreland interests. Except for this, the decree should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

By _____
RICHARD S. WHITE, of counsel
for City of Seattle
Appellee-Appellant

APPENDIX

APPENDIX "A"

STIPULATION

It is stipulated by and between the parties that Exhibit "A" attached hereto is a true copy of Agreement between City of Seattle and Public Utility District No. 1 of Pend Oreille County, Washington dated December 20, 1965, and that the court may consider this agreement as part of the record on appeal.

DATED this 5th day of April, 1966.

RICHARD S. WHITE
Of Attorneys for the City of Seattle

WILLIAM G. ENNIS
Of Attorneys for Public Utility District No. 1 of Pend Oreille County, Washington

APPENDIX A

AGREEMENT

THIS AGREEMENT, made and entered into this 20th day of December, 1965, by and between the CITY OF SEATTLE, hereinafter referred to as the City, and PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, hereinafter referred to as PUD, WITNESSETH:

WHEREAS PUD is the owner of a hydroelectric project located on the Pend Oreille River in Pend Oreille County, Washington, known as the Box Canyon Project, which was authorized, constructed and is being operated pursuant to the terms of a license issued by the Federal Power Commission February 5, 1952, in proceedings numbered "Project No. 2042," and which said project as originally authorized and constructed includes a power house containing four turbine-generator units, and Article 35 of said license provides as follows:

> "*Article* 35. At such time as the Commission may direct and to the extent that it is economically sound and in the public interest to do so after notice and opportunity for hearing, the Licensee shall install an additional generating unit."

and

WHEREAS Seattle is in the process of constructing a hydroelectric project on said Pend Oreille River known as the Boundary project and located downstream from said Box Canyon project, which said Boundary project was authorized and will be constructed, operated and maintained pursuant

to a license issued by the Federal Power Commission in proceedings numbered "Project No. 2144," Article 48 of which provides:

> "*Article 48.* The Licensee shall within two years from the time Boundary Project is placed in operation, enter into an agreement with Public Utility District No. 1 of Pend Oreille County to compensate the PUD for encroachment on the Box Canyon Project No. 2042. In the event no satisfactory agreement is concluded by such time, then upon application by the PUD the Commission shall fix and determine the compensation to be made by the Licensee to the PUD for such encroachment after notice and opportunity for a hearing."

and

WHEREAS Seattle, for the purpose of acquiring lands and rights needed by it in connection with its Boundary project, brought action in the Federal District Court of the Eastern District of Washington, Northern Division, cause No. 2357, to condemn certain lands and rights owned and held by PUD, in which action PUD contended that in determining the extent of the taking by Seattle for which PUD would be entitled to compensation it should be considered on the basis that Seattle would exercise in full the legal right it sought to overflow with its Boundary project reservoir all of the second class shore lands on both banks of the Pend Oreille River extending downstream from the Box Canyon Dam, thereby raising the water level in the Box Canyon project tail race to elevation 2,004 feet and destroying to a great extent the power and energy production capacity of Box Canyon Dam; and

WHEREAS the Federal District Court aforementioned ruled in said condemnation action that Article 48 of the Boundary license above quoted was binding on the PUD and prescribed an exclusive means of determining encroachment damage on the Box Canyon project by the Boundary project reservoir and thereby eliminated this element of compensation from said condemnation action, which said ruling, among others, is the subject matter of PUD's appeal of said action to the United States Circuit Court of Appeals for the Ninth Circuit; and

WHEREAS the parties desire to agree at this time as to the manner in which the extent of the encroachment of the and the manner in which Seattle shall compensate PUD for such encroachment;

NOW, THEREORE, in consideration of the premises and of the mutual covenants and agreements hereinafter set forth, IT IS AGREED AS FOLLOWS:

1. The PUD and the City shall by joint agreement select an engineer or engineering firm to act as Chairman of a three-man Board, consisting of the Chairman and the chief engineer of each of the parties or their duly authorized representatives. The chairman of the Board shall be skilled in the conducting of such tests and making such observations as are necessary to determine the loss of plant capacity, power and energy production resulting from encroachment of the Boundary Reservoir on the Box Canyon plant. He shall also be skilled in deriving from these data performance curves necessary to the future determination of such losses

under all plant operating conditions. The Board shall determine and cause to be made and interpret the results of tests and observations required to achieve the desired objectives within the limits of accuracy commensurate with the probable reliability of hourly observations necessary to the determination of encroachment losses from the performance curves. Upon submittal of its reports to the parties interpreting the results of the tests and investigations aforesaid and establishing continuing operating procedures for the determination of encroachment, the Board shall be dismissed.

The PUD shall make available to the Board at the cost of reproduction such of its records as it may require, and shall permit the calibration of and operate at its expense all existing meters, gages and gaging stations for all the purposes required by this agreement. The PUD shall also permit the installation within or without the plant of necessary or desirable temporary instruments and gages.

The City will pay all costs of the tests and determinations above outlined, including reimbursement for lost revenue due to curtailment of plant production for the purposes of these tests.

2. The City will estimate and later compute within the accuracy of gage and meter readings and the performance data derived from the above-described tests the loss in power and energy generated and transformed at the Box Canyon Project during each hour of the day due to encroachment of the Boundary Reservoir and the City will make restitution for said loss in kind at the terminals of the 115 KV side of

the Box Canyon Substation through normal scheduling procedures at the time it occurs or such other times as are mutually agreeable. Any adjustments required from the previously scheduled estimates shall be scheduled as deviations in the manner customary in scheduling energy transfers.

3. PUD agrees to install and maintain at the expense of the City any additional instrumentation that may be required by the Board.

4. Determinations by a majority vote of said three-man Board shall be binding on both parties. The calculation of encroachment losses, derived observation and the performance curves in accordance with instructions for their use prepared by the Board shall likewise be binding.

5. Both parties also being parties to the Pacific Northwest Coordination Agreement of September 15, 1964, and to the Box Canyon Power Purchase Contract of August 1, 1955, agree to cooperate on mutually advantageous arrangements under the terms of either or both of said contracts for delivery, transmission, storage, or exchange of the power and energy herein contracted to be delivered by Seattle.

6. Upon the properly authorized execution of this agreement by the parties hereto, the claim made by PUD in the aforementioned condemnation action with reference to the destruction of production capacity of Box Canyon Dam by reason of encroachment by the Boundary Project Reservoir and referred to above shall be deemed settled and eliminated from said condemnation action without prejudice and to any

and all claims and contentions asserted by PUD in said condemnation action. Also this agreement shall be deemed to constitute the agreement for compensation by Seattle to PUD for encroachment on the Box Canyon Project referred to in Article 48 of the FPC Boundary Project license hereinabove quoted.

7. Except as to claims for loss of plant capacity, power and energy production resulting from encroachment of the Boundary reservoir on the PUD's Box Canyon plant, nothing herein contained shall be construed to constitute settlement of or a bar to any claim or claims that may hereafter be asserted by PUD against the City, either for damages to the properties of PUD not taken by the City in condemnation Cause No. 2357 aforementioned or for additional costs and expenses PUD may incur in the maintenance and/or operation of its said properties occasioned by the construction, maintenance, or operation of the Boundary project works or of the works appurtenant or accessory thereto.

The inclusion of the foregoing paragraph shall not be construed as the admission of liability by the City for any such claims.

IN WITNESS WHEREOF, the parties have hereunto set their respective names and seals this 20th day of December, 1965, by their agents thereunto duly authorized, in the case of Seattle by its Ordinance No. 94325, and in the case of the PUD by its Resolution No. 629.

CITY OF SEATTLE

By (s) J. D. Braman
Mayor

Attest:
C. G. Erlandson
City Compltoller

PUBLIC UTLITY DISTRICT NO. 1 OF
PEND OREILLE COUNTY, WASHINGTON

By (s) John M. Fountain
President

Attest:
F. W. Schwab
Secretary